CLAIMING THE FUTURE:
Anthropology's Involvement in Aboriginal Land Rights.

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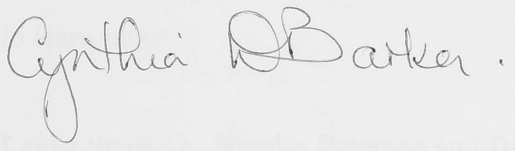
October 1999

A sub-thesis submitted in fulfillment of the requirements for the degree of
MASTER OF ARTS (ANTHROPOLOGY)
The Australian National University
Canberra

Declaration

I hereby declare that this thesis is entirely my own work. I certify that all sources used and assistance given has been fully acknowledged.



Cynthia D. Barker
5 October 1999

Acknowledgements

I am greatly indebted to a number of people, my husband Roy, without his strength and belief in me, this thesis would still be in the 'things to do part' of my life. I also wish to thank my Australian friends who have been supportive and encouraging throughout the whole process, Anne Ellis, Sue Harding and Chris Wright. They have listened, read and made helpful comments.

I have been encouraged by the students of the thesis writing group and academics in the Department who have given me sage advice during the writing of this piece. I would like to thank Kathy Callen, Postgraduate Administrator and Sue Fraser, Departmental Administrator who always found time to listen in a busy place and have shown genuine interest in what I was doing.

I realise how lucky I was to have met Dr. Fiona Magowan during the brief time she was at the University of Manchester, she kindled my interest in Australian Aboriginal anthropology and recommended The Australian National University as the place to go to learn more.

I must thank Dr. Nicolas Peterson and Dr. Debbie Rose, they gave me access not only to materials I would otherwise never have seen, but also their extensive knowledge and experience.

Lastly, although he deserves the highest appreciation, is Dr. Ian Keen, who made me welcome when I made my first tentative approach to the ANU in 1994 and who became a thoughtful and supportive, if challenging, supervisor. He has shown considerable patience, particularly when contacted at unsociable hours, during the final stages of this project.

Thank you one and all.

Abstract.

This thesis examines the ways in which anthropologists and the practice of anthropology has contributed professionally to the land rights process through the production and construction of claim books. The books translated and formulated the complexities of Aboriginal religious life and culture into an accessible and acceptable mode of recording for the legal system. These claim books became the distillation of the Aboriginal claimants' case for the return of land under the Act and were an integral part of the overall claim for land. I will consider what influence, if any, the profession had on the Land Rights process, what form it took and how the process of compiling data for the claim books, required for the legal process, informed and expanded the discipline of anthropology and added to the body of knowledge in respect of Aboriginal society and social organisation.

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Introduction.

The thesis will consider the way in which anthropology and its practitioners have constructed land claim books, and how these have translated and interpreted Aboriginal culture and social organisation, as an integral part of Aboriginal evidence for Aboriginal claims in land, made under the Aboriginal Land Rights (Northern Territory) Act 1976. The claim books were a legal requirement and anthropologists used their academic and fieldwork skills in the compilation of these documents. The data contained in the claim books underwent rigorous testing through the adversarial legal process and added significantly to the body of anthropological knowledge in respect of Aboriginal culture and beliefs systems.

Chapter One briefly reflects on the history of Land rights and presents what I believe to have been a number of defining moments that challenged not only the Government of the day, but other parties who were known to have a vested interest in Aboriginal land. The thesis goes on to show that these challenges helped to pave the way for a major mind shift in the general attitude of most of Australia, especially in urban areas, and how these developments led, in due course, to the setting up of the Woodward Commission. Chapter Two explores in some detail anthropology's involvement with all aspects of the Commission, its recommendations and the resultant legislation, namely, the Aboriginal Land Rights (Northern Territory) Act 1976.

Chapter Three provides in-depth case studies of three claim books that were submitted under the Land Rights Act, demonstrating not only the contribution made by anthropologists through the construction and production of claim books to the legal process, but also how these documents led to a greater understanding of Aboriginal social organisation, culture and beliefs. It shows how the contents of the claim books were firmly embedded in anthropological models and concepts, and highly reproducible, and how these documents had to withstand intense examination from the lawyers and the legal system. This section also demonstrates how the

adversarial system, inherent in the legal process accented the tensions which existed between Aboriginal claimants and the Northern Territory Government.

Chapter Four focuses on Mr. John Reeves Q.C.'s "comprehensive" review of the Land Rights Act, his subsequent Report, and the criticism and controversy which surrounded not only the recommendations resulting from the Review, but also the way in which anthropologists considered that their own and other anthropologists' work had been misinterpreted, decontextualised and manipulated for questionable motives.

Chaper Five draws together the ambient factors that demonstrate how anthropology and anthropologists have influenced the Land Rights Act, then briefly reflects on ways in which anthropologists have positioned themselves in the sites of contestation and how the skills gained from professional practice have enabled them to negotiate those differential areas between advocacy and objective research.

Chapter 1.

To Satisfy Reasonable Aspirations:

A Brief Historical Perspective.

> We will legislate to give Aborigines land rights-
> not just because their case is beyond argument
> but because all of us as Australians are diminished
> while the Aborigines are denied their rightful place
> in this nation.
>
> *Gough Whitlam.* 13:11:72.

This historic Labor policy statement was made during the Federal election campaign of 1972, and not only placed the issue of Aboriginal land rights firmly on the Federal political agenda, but also publicly acknowledged that Aboriginal people had been the victims of institutionalised discrimination since the First Fleet arrived on the shores of Australia in 1788. Whitlam's statement demonstrated that it was the intention of the Australian Labor Party, which he led, to positively address Aboriginal calls for land rights nationally, rather than leaving it to the separate States to implement their own policies. From the creation of the Commonwealth in 1901Aborigines and Aboriginal issues had been the responsibility of the States, but Whitlam wanted greater Aboriginal involvement in the consultation process and in the way land rights were to be implemented. In December 1972 the Australian Labor Party was elected to Government after twenty-three years in opposition. Whitlam became Prime Minister and began to legislate in accordance with the policy statements, made during the election campaign, concerning Aboriginal people.

In the new Labor Government Gordon Bryant was appointed to the cabinet as Minister for Aboriginal Affairs. When in opposition, Bryant and Kim Beazley Sr. had been involved with the Yolngu people of Yirrkala when they were creating the Bark Petition and opposing Nabalco's mining on their land. When a Land Rights Commission was established on February 8th 1973, the Judge selected to preside was Mr Justice Woodward, who in 1971, had been the counsel for the people of Yirrkala in the Milirrpum v. Nabalco Pty. Ltd. and the Commonwealth of Australia, commonly known as the Gove Land Rights Case. The Commission

was not set up to decide if there was a case for Aboriginal land rights, but to determine how land rights were to be addressed and implemented. McMahon when Prime Minister had also addressed the issue of Aboriginal affairs on Australia Day in1972, but the Liberal Party was not prepared to consider these in any political sense. The Liberal Party had little understanding of what Aboriginal people were seeking to address under the rubric of land rights and the recognition of indigenous rights. In general, the Liberal Party's concept of Aboriginal identity was restricted to acknowledging their disparate modes of living within Australian society, and their linguistic and artistic heritage.

The Coalition Government envisaged that Aboriginal land rights could be addressed by implementing different types of leases in respect of Aboriginal reserves. This was refuted by Aboriginal people as Peterson & Sanders assert in *Citizenship & Indigenous Australians,* "While this recognition of Aboriginal culture was welcomed, the offer to deal with land rights by leasing back land to the Aboriginal people was ridiculed" (Peterson & Sanders 1998:18). On the day of this Government announcement, 27th January 1972, a group of Aboriginal people set up the 'Tent Embassy' in Canberra, outside what is now Old Parliament House, but which was at that time the seat of Government. Peterson & Sanders believe that the 'Tent Embassy' was "a defining moment in Aboriginal political history in which [*sic*] Aboriginal people started setting the political agenda in Aboriginal affairs" (Peterson & Sanders 1998:18). The 'embassy' remains so to this day, even though there have been many attempts to remove it. The present Liberal Government have also stated their intention to remove this 'illegal' structure, citing a variety of reasons - it is unsightly, an environmental hazard or it deters tourists from visiting Old Parliament House. Ian MacDonald, the Regional Services Minister, has suggested that it should be replaced with a monument (Marris 1999)

I think that there were a number of events which laid the foundations for the open expression of Aboriginal resistance culminating in this 'defining moment', for the Aboriginal voice had not been silent, it had just not been listened to or considered by the Australian governments (Attwood&Markus 1997). For me there are three episodes worthy of particular mention. One such occasion occurred in 1938 at

Redfern in Sydney when Aborigines held a Day of Mourning on Australia Day, the 150th anniversary of the landing of the First Fleet. This was the first significant public demonstration in which those Aborigines present claimed to be "representing the Aborigines of Australia" (Gray 1998:55). At this conference, the main issues on the agenda were the demand for full citizenship rights and an end to institutionalised discrimination on the basis of ethnic origin. Those present passed a resolution calling on

> the Australian nation of today to make new laws for the education and care of Aborigines, and we ask for a new policy which will raise our people to full citizen status and equality within the community (Gray 1998:55)

While urban Aborigines were asking for citizenship and equality, Aboriginal people who lived in the isolated areas of the country were using what strategies they could to remain on, or near, their traditional homelands, however their claims were not promoted by the States or in the media. It was in these areas that Aboriginal people were demanding rights to land and challenging international business enterprises, such as the mining companies and the governments who were issuing mining leases. They not only had to withstand the encroachment of settlers, missionaries[1] and miners, but anthropologists[2] as well. Where possible, Aborigines chose to work as stockmen, shearers etc on the large cattle stations in order to remain on their land. The creation of mission stations also enabled some Aboriginal people to remain on or near their country, but over time they found themselves confined to smaller and smaller areas as the settlement of Australia and the issuing of pastoral and mining leases continued apace. Some of the missions were benign and the Methodist Mission in Arnhem Land was considered to be less oppressive than those in other States. Keen believed that the Mission resolved

> to gain its ends through persuasion rather than force, and without radical cultural surgery such as the dormitory system, banning of ceremonies, prohibition of arranged marriages, and enforcement of the use of English found elsewhere (Keen 1994:297).

The excision of a large area of land from the Arnhem Land Reserve on the Gove Peninsula was one of the reasons the people of Yirrkala gave when they first

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[1] A Richard Johnson was appointed chaplain by William Pitt and travelled on the First Fleet

[2] Ethnographers had been recording Aboriginal culture from the early settler days. The first Department of Anthropology in Australia was created at Sydney University in 1925. Radcliffe-Brown held the inaugural chair from 1926 until 1931.

petitioned Parliament on 14 August 1963. A second petition from Yirrkala was presented to Parliament on 28 August.

These petitions were the forerunners of the first major land rights case – Milirrpum v Nabalco Pty. Ltd. and The Commonwealth of Australia – commonly known as 'The Gove Land Rights Case'. This was heard in the Supreme Court of the Northern Territories and the judgement was delivered on 27 April 1971. Although the case went against Milirrpum, the Gove Case demonstrated that Aboriginal people were prepared to use the Anglo-Australian judicial system to establish their rights to land and were prepared to raise these issues outside Australia, thus placing Aboriginal rights in the International arena.

Aboriginal people's requests for exclusive use and access rights in land were not a new phenomenon. Reynolds (1992:83) cites the British anti-slavery parliamentarian Thomas Fowell Buxton, as advocating Aboriginal land rights in 1834; Buxton reasoned that "We have usurped their lands, kidnapped, enslaved and murdered themselves [*sic*]. The greatest of their crimes is that they sometimes trespass into the lands of their forefathers". Hagen discovered, during the preparation of a recent land claim to areas in Victoria and New South Wales, that the Yorta Yorta/Bangerang people had made representations to the colonial state governments in 1881, 20 years prior to Federation. They requested help from the Aboriginal Protection Association (NSW)[3] to enable them to gain access to their land and the flora and fauna on that land. They wanted this access to redress the treatment they had received as their land had been annexed by the settlers and they had been forced from these lands (Hagen 1996:125).

The States gave settlers pastoral and other leases for huge areas of land without consulting the Aboriginal people who were already living there. While the leases may have contained clauses that gave Aboriginal people the right of access to the land for hunting and gathering, they were not encouraged by the lease owners to exercise these rights (Sackett 1994). Aborigines were considered to be just figures in a landscape, they were not seen as 'using' the land productively by

[3] Aboriginal Protection Association NSW a voluntary organisation which raised funds and lobbied the government (Harris 1994:226).

growing crops or husbanding stock. The boundaries which Aboriginal people acknowledged, were not precisely defined by fences or on a tangible legal document.

Sutton contends:

> that there are different degrees of boundedness about the edges of even a single Aboriginal estate in the tropical north, where such things have been mapped on the ground in fine detail. It is quite typical for there to be fine and clear demarcation of the edge of an estate at points along a beach or river frontage" (Sutton 1995:51).

Knowing what was 'your' country or your 'father's' country was not sufficient or understood by the early colonisers who, largely, had no knowledge of the Aboriginal system of governance, considering Aborigines "a primitive, useless barbarous 'race' who were doomed to extinction", while asserting that "their own 'natural superiority' entitled them to ignore the interests of the indigenes" (Attwood 1989:105). This racist rhetoric was invoked whenever Aboriginal issues were raised by humanitarians or religious institutions seeking to demonstrate the discriminatory processes which were being applied to Aboriginal people. It was used to exclude and marginalise, and to justify the expropriation of huge areas of Aboriginal land.

The third notable event occurred at Wave Hill Station in August 1966 when the Gurindji people went on strike and walked off the cattle station. They demanded that Lord Vestey, an absentee British landlord, return their land to them and that they be paid the same wages as the white workers on the station. The Gurindji walked to Wattie Creek, camping there, breaking the law and having to have food smuggled to them. As a result they stayed and eventually obtained the title to a portion of their land in 1975. Yunupingu (1997:5) contends that:

> these two events, the sending of the Bark Petition and what is known as Gurindji Freedom Day, were among many that lead to a groundswell of support for Aboriginal rights.

During the 1960s there had been a concerted movement to address the issues raised by Aboriginal requests for land, equal rights and civil liberties. These were not being attended to by the States, who had not been prepared to cede this power to Federal government under the Constitution - the founding document of the

Federation[4]. This was because the six colonies, as they were prior to Federation, wanted to maintain their individual status and not completely relinquish their independence to a central body on becoming a State (Attwood & Markus 1997:2). The Federation was considered, at this time, able to centrally locate and provide consistency to those elements of government which were necessary for unification, such as the security of the nation, and to establish free trade between the states and a common currency. The Federal Government was to be the arbiter of conflicts and inconsistencies whilst preventing any over lap in the legislative process.

According to Attwood and Markus, "the Australian Constitution was drawn up at a high point of racism in this country" (Attwood & Markus 1998:119). They contended that at the time of Federation, Aboriginal people were considered to be "a dying race" and not the equals of Europeans, and as such did not justify the same levels of government expenditure and involvement in the political process (Attwood & Markus 1998:121; McGregor 1997). While Aboriginal people were not uppermost in the thoughts of the founding fathers who wrote the constitution, the clauses which related directly to Aborigines are now considered to be discriminatory in character. These clauses are:-

> Section 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace and good order, and good government of the Commonwealth with respect to:-
> (xxvi) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws (Sawer:1975:48),
> and
>
> Section 127. In reckoning the numbers of people of the Commonwealth, or of a state or other part of the Commonwealth, aboriginal (sic) natives shall not be counted (Sawer 1975:62).

These clauses held considerable relevance for, and were central to, the referendum movement. They became of significant symbolic importance to Aboriginal people (Attwood & Markus 1997).

From the creation of the Commonwealth, with Federation in 1901, until the 1960s, Aboriginal people were under the control of the laws of the particular state in which they lived. These, in general, were restrictive, and in some cases led to institutionalised abuse. The laws denied Aboriginal people citizenship rights and

[4] The Federation was formed in 1901 when Tasmania, New South Wales, Victoria, Queensland, Western Australia and South Australia - the six British colonies formerly separate entities - came together to form the Commonwealth of Australia. These colonies were then known as States.

treated them as wards of the State, with the State in *locus parentis*. The laws were used to control the Aboriginal people; decisions were made for and about Aborigines rather than involving them in any process of consultation. In some parts of the country, the Aboriginal Protection Acts[5] led to the systematic separation of Aboriginal children from their parents, which not only ensured their separation from their traditional homelands, but also their culture and their religious heritage. This group of dispossessed people has become known as "The Stolen Generation"[6] although it was not just one generation of Aboriginal children who were involved in this process. A staggering estimate of 5,625 Aboriginal children were separated from their families in New South Wales alone (Read 1984:9).

In 1953 Paul Hasluck, Minister for Territories, introduced the Northern Territory Welfare Ordinance. This Ordinance was fundamental to the implementation of the wide reaching assimilation policy[7] of which Hasluck was the main architect and supporter. The main objective of this policy was to achieve the assimilation of Aboriginal people into Australian society. Hasluck had also taken the stance that mining, even on Aboriginal reserves, was good for Aboriginal people because it would "help the transition from a sheltered life on a mission to a full life in the general Australian community at the normal [*sic*] Australian standards" (Harris 1994:841). Reeves notes

> In the Northern Territory, Government Aboriginal settlements were an essential part of the 'assimilation' policy in that they were half-way houses between traditional lifestyles and the wider world. Mission stations had the same purpose and were administrated in a similar manner. Neither recognised, or accommodated, associations with particular areas of land (Reeves 1998:22).

At this time land was not envisaged as an integral factor of Aboriginal social organisation by the dominant white culture. The policy-makers lacked the in-depth knowledge of Aboriginal social organisation, and did not consider the dislocation or disputes which arose by bringing together different Aboriginal

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[5] Aboriginal Protection Acts were created as early as 1886 and began the process of removing children of mixed descent from their Aboriginal homes and introduced half-cast categories.

[6] See the Human Rights and Equal Opportunity Commission's report 'Bringing Them Home' 1997.

[7] The subordinate or smaller group is absorbed in to a larger more dominant group with a resultant loss of their individual culture and as a result becoming indistinguishable from the dominant culture.

groups from across Australia. The result was the amalgamation of Aboriginal people who lacked filial ties and spiritual connections to the land on which they found themselves, as well as coming from disparate language groups, and was a recipe for internal conflict on the Missions.

However, Aborigines, on the whole, considered these policies as belonging only to the white Australians, as they had their own laws and beliefs which permeated all aspects of their daily lives, defining their relationship to land, as well as their individual roles and status within the Aboriginal community.

As communication systems within Australia grew, so did a sense of moral indignation at the way in which Aborigines had been treated over time and the individual and State laws that were only enacted and used against Aboriginal people. The 1960s were a time of radicalism and protest, not only against the Government's support of the war in Vietnam and the conscription of young men to fight in it, but also for the equality of rights for all Australians whatever their gender or skin colour. While there had been liberal, humanitarian views expressed in support of Aboriginal people from the early 19th century these had not become embedded in the psyche of the general populace at this time. This Zeitgeist led to public demonstrations at the injustice of the situation Aborigines were in and culminated in the Commonwealth 1967 Referendum in which voters were asked

> Do you approve the proposed law for the alteration of the Constitution entitled – "An Act to alter the Constitution so as to omit certain words relating to the People of the Aboriginal Race in any State and so that Aboriginals are to be counted in reckoning the Population. (Attwood & Markus 1997:55).

The Referendum did not give Aborigines the vote or citizenship, common misconceptions about which even high profile politicians have been mistaken. Almost 91% of the Australian voters voted 'Yes' and this was considered to demonstrate a more enlightened attitude towards indigenous people and a belief by the majority of the Australian people that "all Australian citizens, indigenous or otherwise, became equal under the Constitution with the same rights and responsibilities"(Attwood& Markus 1998:132). However as Attwood and Markus were later to comment,

> one must note that the relatively large No vote in the referendum in the rural areas (as high as 29.04 percent in the case of Kalgoorlie), where there was the highest or most visible populations of Aboriginal people, is conveniently forgotten (1998:133).

It was against this groundswell for reform and recognition of Aboriginal rights that Mr. Justice Woodward received the Letters Patent from the Governor General of Australia, Sir Paul Hasluck. It was not without irony, as it was the same Hasluck who had been the architect of, and propounded, Assimilation. The Letters Patent authorised Woodward's inquiry to report into

> The appropriate means to recognise and establish the traditional rights and interest of the Aborigines in and in relation to land, and to satisfy in other ways the reasonable aspirations of the Aborigines to rights in or in relation to land, (Woodward 1973:iii)

The Letters Patent stipulated that Woodward was to consider a number of issues; how title to the land could be conveyed to Aboriginal groups or communities in those areas of land in the Northern Territory which were already designated for "the use and benefit of the Aboriginal inhabitants ... including rights to minerals and timber". The creation of formal representative bodies, the procedures for examining "the claims to Aboriginal traditional rights and interests in or in relation to land in areas ... outside Aboriginal reserves or of establishing alternative ways of meeting effectively the needs for land of Aboriginal groups or communities living outside those reserves". Woodward was also requested to look at the leases which already existed in respect of mining and Crown land and how these would be affected by "recognising and establishing Aboriginal traditional rights and interests in or in relation to land". He was then to formulate the required legislative changes which would enable his recommendations to be implemented. There was also a 'catch all' clause which required him to investigate "such other matters relating to rights and interests of Aborigines ... as may be referred to the Aboriginal Land Rights Commission by the Minister for Aboriginal Affairs" (Woodward 1973:iii).

Having been involved with the Yolngu people of Yirrkala during their legal action in the earlier Gove Case, he had quite definite ideas concerning the best way to gather the information he required in order to put together a report which would achieve the objectives of the Government of the day. Woodward also had as his research assistant Dr. Nicolas Peterson, an anthropologist, who had carried out field work in North-East Arnhem land, studying ecology and land use for his

doctoral research. Their practical experience of living, working and communicating with Aboriginal people over time would prove useful in the preparation of the report.

Anthropologists such as Elkin and Thompson had been involved in Government inquiries in the past (Gray 1998:56; McGregor 1997:230). However, as a result of the Gove Case, in which Aboriginal social organisation and tradition became a major issue and focus of the law, anthropology and anthropologists became an integral part of the legal process in respect of land rights cases. During the Gove court case Woodward had called two eminent anthropologists, Professors R M Berndt and W E Stanner, to give evidence on behalf of the people of Yirrkala. Berndt and Stanner tried to clarify for the Court their interpretation of the concepts of the 'Tribe', 'Horde' and 'Clan', and hypothesised on how these were central to Aboriginal social organisation.

There was some dissent among other anthropologists at the way in which they had used these terms (Hiatt 1982:262). Blackburn commented in his judgement that Woodward was influenced by their testimony (Blackburn 1971:44). This was not surprising as Woodward had called them to give evidence for his clients and, therefore, was convinced that what they had to say corroborated and interpreted the testimony of the Aboriginal plaintiffs.

Mr Justice Woodward indicated that he favoured an informal approach to the process of gathering of information from all the parties concerned. He visited Aboriginal communities, walking over the land and listening to the Aboriginal people talking about the sites and recounting the stories which related to these. He wanted to ensure that Aboriginal people felt comfortable with the process in order to provide as much information as possible. He considered that formal hearings would be intimidating and unproductive, especially when the only previous experience Aboriginal people had of the legal process was negative, or had restricted their personal freedom.

He notes in his first report that

> among the letters and submissions from the Northern Territory I have received very few from Aborigines although there have been several from mission societies and others wanting to put a case on behalf of Aborigines.....In fairness to the Department of Aboriginal Affairs I should say that it offered to stimulate an interest among Aborigines in the Commission's work, but I declined this offer because of the risk that the response might not represent a truly Aboriginal point of view. (Woodward 1973:1)

Woodward approached the whole process aware that there were groups who could unfairly influence the outcome, but he wanted to hear what Aborigines said about land, and their concepts and beliefs in respect of their land. All this sensitive information concerning their laws was to be given freely and not under duress. As a result of his involvement, and the diverse evidence given in the Gove case, Woodward (1974:3) acknowledged quite early in his investigations that there were likely to be disagreements between those considered as 'experts', due, in some part, to the complex nature of Aboriginal social organisation and the differing opinions of those giving evidence, be it Aboriginal, anthropological, or legal.

During his first report, Woodward (1973:4) initially reflected on the route Aboriginal people had taken from "the north and came to an uninhabited land", and established from archaeological evidence that Aborigines had occupied Australia for "a period of upwards of 30,000 years". This archaeological evidence of an extensive period of occupation by Aborigines of the land, demonstrates that Aboriginal people had lived, worked, and used the land, challenging some aspects of the proposition of "*terra nullius*, a land belonging to no-one" (Reynolds 1992:12), which was a legal concept firmly held by the judicial system from the time of the first settlers, until it was overturned in 1992 during the Mabo Case[8]. The case for 'terra nullius' was that Aboriginal people were present in Australia, however, they were considered by those claiming sovereignty for the British Crown in 1788 as being "too primitive to be regarded as the actual owners and sovereigns. They ranged over the land rather than inhabiting it. They had no social or political organisation which Europeans could recognise and respect" (Reynolds:1996:x.).

In the Gove Case, Mr Justice Blackburn had perpetuated this legal fiction. In his

[8] High Court ruled 3:6:92 on the case in which 3 Murray Islanders brought an action against the Queensland Govt.

judgement he maintained that the Yolngu had demonstrated that they used the land for economic and ritual purposes, and that they had a recognisable system of law which was kept by the members of the community and:

> was highly adapted to the country in which the people lived and which provided a stable order of society remarkably free from the vagaries of personal whim or influence..... However, the relationship of the native clans to the land under that system was not recognisable as a right of property and was not a 'right of power or privilege over or in connection with the land'.... The natives had established a recognisable system of law which did not provide for any proprietary interest in the clans in any part of the areas claimed (Blackburn 1971:3).

During the hearings Mr. Justice Blackburn had been taken to sacred sites by Yolngu men and had been shown the secret rangga,[9] but he was not prepared to accept these as charters to land. He saw them as merely "a matter of Aboriginal faith; they are not evidence, in our sense, of title" (Blackburn 1971:43). What he had not understood, and which the Yolngu had tried to demonstrate to him by exposing these sacred items, was that Aboriginal people, and Yolngu in particular, had a unique script which was accessible and had been handed down over time through ceremonies and rituals to the initiated members of their group. However, Blackburn concluded that as Aborigines had no written records they could not establish an indisputable title to the land being claimed - the secret rangga were not adequate proof of the various clans connections with the land.

Blackburn acknowledged that while anthropological research into the land in question had made reference to systems of land holding, these had not produced documents which would constitute a 'register of titles' acceptable to the court. As Aborigines maintained that they had 'inalienable rights'[10] to land, this signified that they were unable to sell or dispose of the land during their life-time and it was held for the next generation, ergo, if Aboriginal people do not have the right to sell or dispose of the land as they choose, they can not own it. Blackburn contended that the propositions offered in evidence by the Yolngu did not constitute ownership in the accepted Australian sense of property law. In his conclusions, he maintained that in evidence the Yolngu had a "more cogent feeling of obligation to the land than of ownership of it...the clan belongs to the land [rather] than the land belongs to them" (Blackburn 1971:131).

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[9] Sacred objects used in rituals.
[10] Not transferable to another.

However, Mr Justice Blackburn did recognise that Aboriginal people had a system of law which identified specific groups of Aborigines with particular areas of land. Woodward considered this was "crucial to the land rights movement" because it "gave legitimacy, in European terms, to Aboriginal requests for legislation which would enable parcels of land to be allocated to particular groups of Aboriginal claimants" (Woodward 1985:416). It was from this standpoint that Mr. Justice Woodward began his inquiry and produced his first report, which he presented on the 19th of July 1973, five months after the issuing of Letters Patent.

Woodward produced an interim report in order to outline problems and difficulties he had encountered during his research and to consider ways in which these could be addressed. Looking for solutions which would provide the means to meet the criteria laid out in the Letters Patent to provide land rights to Aboriginal people in the Northern Territory, Woodward was concerned that initially he had received very few submissions from Aborigines, most had come from "mission societies and others wanting to put a case on behalf of Aborigines. The letters from Aborigines were mainly from secretaries of community councils". He did not believe that this poor response equated with a lack of interest in the issues he was considering but rather "suggested a lack of contact and information" (Woodward 1973:1). He attempted to overcome this breakdown in communication by visiting over twenty Aboriginal centres where he talked and listened to the spokesmen of those Aborigines living on all but four of the Aboriginal reserves at that time. He also held information gathering meetings in Alice Springs and Darwin, but was unable to access those cattle stations which had only small communities of Aboriginal people living there.

It also became evident that there was no homogeneous Aboriginality which spanned the whole of the Northern Territory. Stanner and Berndt had made this point during the Gove Case. Woodward ascertained that Aboriginal social organisation was highly complex and their thoughts and concepts concerning the way land was used, by whom, and who owned the land, were not readily translated into English or had a correspondence in Anglo-Australian law. Each group keenly defended their differences, the rituals, ceremonies and sacred sites

related to the Ancestral beings[11] who, they claimed, had come from, or travelled across, the land during the 'Dreamtime'[12], giving each separate Aboriginal group the primary spiritual responsibility for the land, and all the creatures and features found on it.

The major recommendation he made was that two Aboriginal land councils be created in the Northern Territory. One was to be based in Alice Springs covering the central region – the Central Land Council, the other in Darwin for the northern sector – the Northern land Council. He chose the option of two Land Councils for a number of reasons, firstly, one council would have been too cumbersome and unmanageable because of the number of members it would have had, secondly, the land area covered by the Northern Territory, and thirdly, the logistics of getting a number of people to travel from the distant parts of the Territory was also impractical and might lead to increased conflict encouraging factionalism among the various groups of Aborigines.

Woodward also recommended that Government should finance independent legal advice for these Land Councils after their inception. He believed the Councils would provide a forum where Aboriginal people would be represented, be able to put forward their own ideas and propose solutions that were in accord with their cultural beliefs. The outcomes of these discussions were to be fed back to the Commission or Government for consideration.

Woodward also identified a number of Aboriginal communities which he thought should own the reserve they lived on, such as the Tiwi people who lived on Bathurst and Melville Islands. Where there was conflict over boundaries or the land was 'unoccupied', this should come under the control of the appropriate Land Council until a legally binding decision could be made. In respect of exploration leases, Woodward considered that the land boards of each community should be free to refuse permission to mining companies unless the Government decided it was not in the national interest to do so.

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[11] Believed to have shaped the world and as they travelled over and under the land created all the flora and fauna, waterhole, sacred sites etc.

[12] In Aboriginal belief systems - the period when Ancestral beings moved across the land.

These were radical proposals, but Mr Justice Woodward was convinced that a just and acceptable outcome for all parties involved in Aboriginal land rights could only come from consultation and consensus. He realised that this would probably take some time to achieve but "it is more likely to be generally acceptable and to have [a] permanent effect" (Woodward 1973:2). He hoped

> that [Aboriginal] opinion can make itself heard effectively. Aborigines will be able to play a full part in arriving at solutions which are acceptable both to them and to the rest of the Australian community" (Woodward:1973:3).

This completed the first stage of the process of seeking "to satisfy ... the reasonable aspirations of the Aborigines to rights in or in relation to land" (Woodward 1974:1).

Chapter 2.

The Implementation of the Woodward Commissions Findings in Commonwealth Law

In this chapter I intend to consider Mr Justice Woodward's second report in some detail, comparing the way in which this report was reflected in the legislation put forward by the Whitlam Government, and the differences in the actual legislation brought in by the Fraser administration. I will briefly review the academic debate which surrounded the anthropological evidence submitted to the Commission relating to the model of Aboriginal land tenure and social organisation, and how these views were then interpreted by Woodward for the proposed legislation. I will show how anthropologists were closely involved in all aspects of the Woodward Commission, and how this association was maintained during and after the inception of the Aboriginal Land Rights (Northern Territory) Act 1976 - an association which some believe has placed the profession of anthropology in an invidious position that has affected some aspects of the practice of anthropology both in the academic and public milieu (Brunton 1999; Maddock 1999).

Woodward gives in the main principles of the report, a very brief seven line land rights history of Australia, stating that prior to 1788 Australia was distributed among the Aboriginal people "in a way which was understood and respected by all" (1974:8). He goes on to say that those who came to Australia after this time have laid claim to the land with the best potential, that is the most fertile, productive and useful. The manner in which they did this showed "scant regard for any rights in land, legal or moral, of the Aboriginal people". He thought that this "human tragedy" had not been conceptualised by the Australian people and that a good way to address this was for the Government to promote the teaching of Aboriginal history in schools, highlighting some events which would provide a "better understanding than we have of the background to claims for Aboriginal land rights" (Woodward 1974:8).

Woodward clearly wanted to demonstrate that Aborigines did have justifiable claims to land through traditional connections to land, that this was of great importance to them and that they were not after 'something for nothing'. In this way he hoped to prevent a backlash from the dominant white culture. He believed that people would be as convinced by the historical facts of Aboriginal land rights and dispossession as he himself was. However, even today, those involved in setting the political agenda for the Nation are more likely to interpret Aboriginal history or anthropological ethnographies in a negative way as the recent parliamentary debate on Native Title demonstrated.

One of the first issues the Woodward Commission had to explore during its inquiry was the evidence in respect of Aboriginal social organisation which had been presented during the Gove Case. Woodward had been the counsel for and represented the people of Yirrkala in the Gove case. When he became Commissioner he involved both R M Berndt and W E H Stanner to provide in-depth specialist anthropological evidence to the commission. This was needed, as Mr. Justice Blackburn, the Judge in the Gove Case, had been less than convinced of their evidence due to its inconsistency with that given by the Aboriginal witnesses. Blackburn (1971:33) acknowledged that the evidence of the Aboriginal claimants showed consistency and had been given "with complete honesty and frankness", however it did not concur with that given by the expert witnesses in respect of the "*mata/mala*"[13] partnership espoused by Professor Berndt . He contended that while "they might be aware of the 'mala mata' concept, it did not occupy the forefront of their own thinking about their clan organisation" (Blackburn 1971:33). Blackburn saw this as an anthropological abstraction which, while acknowledged by the Yolngu, was not as important to, or as firmly held by them, as Berndt espoused. Stanner had anticipated this during the preliminary hearing of the Gove Case, commenting

> I expect the anthropological evidence to come under a very severe attack: I have found widely in official life both hostility and derision towards the work and opinions of anthropologists, and expect court tactics designed to make us appear mere wafflers of vocables, and to make the facts appear either uninterpretable or misinterpreted (Stanner 1979:293)

[13] Mala - group, Mata – language, Berndt contended that everyone in some Aboriginal societies belonged by birth to a specific 'mata-mala ' group and some mala-mata stand in a specific relationship to others.

Stanner was also very astute as to the wider public response to the case which obfuscated the fundamental principles which he believed underlay the process, observing, "A lot of heady stuff is being spoken and believed that partly blinds and deafens people to the racial, social and political aspects of the affair" (Stanner 1979:292). He was pragmatic however, and considered the end result would be in favour of the 'national interest' and not that of the people of Yirrkala, even though he believed the 'national interest', in respect of the mining exploration in Yirrkala, was very small. The mining companies and the government would naturally have disagreed with him on a number of points. Economic indicators and the figures submitted by the mining industry and others to the Woodward inquiry were not inconsiderable and extended well into the future.

Woodward had to acknowledge that Aboriginal social organisation was incredibly complex in its operation and difficult to define. A major difficulty which required resolution was that of clarifying these complex concepts using the English language and considering how these could then be located in a workable legal framework. These concepts needed to be easily accessible for all those who were to be involved while not detracting from, or over simplifying, the fundamental beliefs and knowledge which the Aboriginal people were bringing forward in order to prove their perceived rights in land.

While conceding that anthropologists had been able to describe Aboriginal social organisation explicitly in academic writings and ethnographies, Woodward considered that they had lacked consistency in the use of the various terms in these writings. As a result, each time a term was used, not only did it have to be defined afresh, but also the context in which it was used had to be made explicit again. Professional differences and analyses also needed to be addressed. These had emerged while taking evidence, and had engendered some debate in anthropological literature (Hiatt 1996:23-26). This dialogue involved young anthropologists, who had undertaken field work over extended periods of time in the remote areas of Australia which would become subject to the land rights legislation, and whose observations, analyses and conclusions challenged the established mode of thinking on Aboriginal social organisation. The result of this

ongoing professional discourse was the development of a different interpretation of traditional relationships and social organisation in respect of the ownership of country, how rights in land in Aboriginal society were distributed, and how those rights were manifest.

It was this professional debate which was used by those opposing the Yolngu in the Gove Case to demonstrate that Aboriginal social life and their relationships to specific areas of land had changed over time and were not static. In so doing they were challenging not only Aboriginal rights in land and their strength of connection, but also their Aboriginal identity. The opponents to the claim had little understanding of the way in which Aboriginal people, and the Yolngu in particular, thought and felt about land, and how land was fundamental in the creation of Aboriginal identity and self-determination. The Yolngu were expected to demonstrate that their progenitors had always lived on, held ceremonies on and used the land in an unchanging and acceptable (European) economic manner prior to the advent of the white colonisers. There were no allowances made for the system of succession which was used by Aboriginal people to take over land where the traditional residents had died, or for the dislocation they experienced by being forcibly removed, or persuaded to move, to missions and reserves. They had to prove that they had never moved from their "own" land or country.

Oral histories provided by the claimants were not sufficiently authoritative for the legal system at that time. As Mr Justice Blackburn stated in his judgement

> I am not satisfied, on the balance of probabilities, that the plaintiffs' predecessors had in 1788 the same links to the areas of land as those which the plaintiffs now claim (Blackburn 1971:58).

The academic debate focussed on, and undertook some re-evaluation of, what constituted a traditional Aboriginal owner or ownership, and the relationship between ownership and economic aspects of how the given areas of land were used and by whom. This discourse had been going on since the early 1960s when Hiatt, among others, had challenged the concepts established by Radcliffe-Brown in relation to the rigidity of Aboriginal boundaries in a paper *Local organisation among Australian Aborigines* which had appeared in Oceania in 1962. Hiatt was approached by the Crown-Solicitor's Department to review the anthropological

evidence presented for the plaintiffs in the Gove Case. He had considered this for a few days but decided against it. He realised that there was a chance that either side might subpoena him, so he had prepared a statement, which he hoped, would go some way to rectify the disagreement between himself and Professor Stanner. Hiatt wrote to the legal representatives for the plaintiffs and provided a statement for them. Hiatt stated in the correspondence that, "My aim will be mainly to indicate the principal areas of agreement and disagreement among anthropologists on the subject of Aboriginal ownership and the use of the land" (Hiatt 1982:261).

Hiatt was concerned, with just cause, that the well publicised disagreement between Stanner and himself in respect of Radcliffe-Brown's "orthodox" model of Aboriginal social life would be used by the protagonists in the Gove land issue "to the detriment of a cause we both whole heartedly believe to be just" (Hiatt 1982:262). It is clear that Hiatt recognised, and felt some responsibility for, the fact that his work could be used in a negative way to dispossess people he had come to know through strong working relationships, and who had been his informants during his time in the field.

It was this personal involvement of anthropologists with the Aboriginal claim groups that often became the subject of scrutiny by the opponents and the lawyers in the legal process. The aim of this intense examination was to establish a bias and lack of objectivity on the part of the consulting anthropologist, so as to place them firmly in the role of advocate, rather than as an impartial observer of the Aboriginal cultural milieu.

Hiatt believed that there were more points of agreement than contention in their on-going discourse. This professional decision not to provide information for those groups opposing the Yolngu claim, unless issued with a subpoena, initiated an on-going major debate as to the value of the evidence provided by anthropologists and its objectivity. The question raised by the lawyers for the opponents centred on whether the evidence presented was hearsay. They made this challenge to the authenticity of the anthropological evidence claiming the evidence presented by anthropologists was based on what they had been told by

others, rather than direct observation or personal experience. (Blackburn 1971:21)

Justice Blackburn deliberated on this issue in some depth for his judgement of the Gove case, detailing the breadth of experience both Stanner and Berndt had within the field of anthropology. However the Solicitor-General questioned the amount of time which Stanner had spent with the Yolngu people, which amounted to eleven days in total, over two visits to the area. Stanner admitted that this was a short period of time from which to construct an anthropological argument about the social organisation and land ownership of the Yolngu, however he qualified this during his evidence explaining that he was looking to verify the knowledge he had gained working with Aboriginal people in other areas of Australia. Stanner wanted "to satisfy myself that I was not simply talking on an abstract plane" (Blackburn 1971:20).

Mr Justice Blackburn then went on to clarify why he was prepared to accept the evidence of anthropologists as expert witnesses. This centred on the acceptance of anthropology as a recognised field of research and knowledge comparable with the sciences, such as chemistry or medicine. His rationale for accepting anthropological evidence based on conversations and information given to the anthropologist during fieldwork was as follows:

> My ruling is based on accepting that there is a valid field of study and knowledge called anthropology which deals with the social organisation of primitive peoples (the definition will serve well enough for the purpose in hand). The process of investigation in the field of anthropology manifestly includes communicating with human beings and considering what they say. The anthropologist should be able to give his opinion, based on his investigation by processes normal to his field of study, just as any other expert does. To rule out any conclusion based to any extent on hearsay - the statements of other persons – would make a distinction, for the purposes of the law of evidence, between a field of knowledge not involving the behaviour of human beings (say chemistry) and a field of knowledge directly concerned with the behaviour of human beings, such as anthropology. A chemist can give an account of the behaviour of an inanimate substance in reaction, but an anthropologist must limit his evidence to that based upon what he has seen the aboriginals doing, and not upon what they have said to him. (Blackburn 1971:21)

Blackburn was clear that while he was prepared to accept the opinions of anthropologists in respect of what they had observed and what they had recorded from conversations, these views had to be firmly grounded in fact, and close analysis made of the information given to anthropologists during conversations.

The evidence given had to be able to withstand intense scrutiny in open court. This adversarial system of justice was not readily understood by Aboriginal people who, according to Williams

> found it difficult to accommodate defence council's mode of questioning, and of attempting to elicit from them inconsistent or contradictory responses. Having seen the court situation as analogous to traditional meetings where they expected explanation and persuasion to lead to the expression of consensus. (1986:159)

This was an important precedent raised by Blackburn in respect of anthropological evidence and its acceptability within the legal process, and went some way to establish the professional standing of anthropologists, demonstrating that anthropology had a relevance outside the sandstone walls of academia.

The established anthropological model of Aboriginal land tenure at this time was that propounded by Radcliffe-Brown as early as 1913. This "orthodox" model of land tenure, asserted that "land [is] held or owned by some variety of exogamous patrilineal descent group or clan" (Keen 1984:25). Radcliffe-Brown believed this model could be applied across all Aboriginal communities. Radcliffe-Brown continued to refine his theoretical model during his time at the University of Sydney. A.P.Elkin[14] later supported this model with reservations concerning the universality of its application. It was this established orthodoxy which, according to Hiatt (1984:12), influenced the way in which 'traditional Aboriginal owners' were defined by the Woodward Commission, and finally in the 1976 Act. It is this definition which also engendered "one of the liveliest debates in Australian anthropology... about the adequacy of the definition and how it should be interpreted" (Hiatt 1984:2).

It was also this definition, arising from the anthropological testimony and its interpretation by Woodward, which was of concern to those involved in giving evidence to the inquiry. These concerns related to the Aboriginal groupings and their relationship to land, and the use of 'band', 'tribe' 'horde' and 'clan' as the markers to distinguish the various kinds of groups in relation to land. A band comprised people who moved over and used the land in an economic sense, but

14 A P Elkin, Professor of Anthropology from 1934 until 1956 at the University of Sydney, an ordained minister, and a person of some influence in government circles, was also an advocate of assimilation

were not necessarily solely the primary owners of the land. In Radcliffe-Brown's refined model it was the clan that was the primary landowners with the "horde" being the economic unit who used the land comprising men of the "clan" and their wives, minus the women who had married out.

In Hiatt's model the community was a larger more complex group, and he believed that his views were more favorable to the Yolngu case than those of Stanner. Stanner, on the other hand, accepted that the clan was a somewhat more complex and flexible group than Radcliffe-Brown's version but he was not convinced that Aboriginal society conformed to the model put forward by Hiatt. Stanner concluded that

> Hiatt has reified the general type and, being unable to find a perfect match for it in Arnhem Land, has concluded that other observers were "probably looking for something that never existed in any tribe". A general type does not have to 'exist' except in the distributive sense, which is everywhere yet nowhere in particular. (Stanner 1965:10)

Hiatt also disputed the notion of the rigidity of boundaries and exclusivity of land, claiming that his own findings had been similar to those recorded by Meggitt in the 1950's, in that boundaries were known and respected by the members of all the neighbouring communities (Hiatt 1996:24). This was to be born out during the compilation of the claim books and during the hearings of the subsequent claims (Peterson 1978; Keen 1988).

With reference to the divisions of Aboriginal society Woodward chose to substitute 'ethnic block' for 'Tribe', because, from the information given to him, there could be some confusion in its application. He noted that 'Tribe' had been used not only to classify those Aborigines who came from a clearly identifiable area and had a common language which was used as the name of the group[15], but it had also been applied to a group who were related, lived in the same location but spoke different languages. Woodward did not believe that social or political unity was located at this broad level as he saw this as residing in the smaller, more discrete levels of Aboriginal society, that is the clan.

[15] Woodward cited the Aranda and Pitjantjatjara as examples (1974:136)

He identified the 'clan' as the locus of Aboriginal social organisation, which he considered to be larger than a family group but based around family connections through a common male ancestor. Hiatt claimed that anthropologists have increasingly preferred the term 'clan', as opposed to 'horde', to denote the land-owning group, and used 'horde' to signify the residential and economic unit (Hiatt 1996:23).

This so-called structural model used the term 'clan' to denote the exogamous patrilineal descent group which owns or holds land, with spiritual affiliation as the essential characteristic of the clan's relationship to the land claimed. This came from Berndt's anthropological survey "*The Relationship of Aborigines to Their Land, with reference to Sacred and/or Traditional Sites*" which he had presented to the Commission (Brennan 1994:33). Brennan's analysis of this paper asserts that Berndt considered that ownership of land was gained by being a member of a clearly defined group, acquired through birth and from a spiritual connection. Each clan held specific tracts of land which could be clearly defined, contained major and minor sites of significance for the clan, and which were recognised and held to be such by other Aborigines. The tenure of the land was validated through ceremonial performances and the ownership of sacred rangga. This body of Aboriginal Laws originated in the 'Dreamtime' and was expressed through myth and ritual.

As the land was created, formed and given to the ancestors of the present Aboriginal group, it was considered to be inalienable and non-transferable[16].

1. [16] It was this inalienability of the land which had been one of the stumbling blocks in the Gove case, as there was some debate concerning ownership or 'a proprietary interest' in land in the European sense, which entitled the owner to dispose of the land and/or provide the authority to sell. This was not thought to be the case with the people of Yirrkala, who had demonstrated a "recognisable system of law which did not provide for any proprietary interest in the plaintiffs in any part of the subject land" (Blackburn 1971:134). Brennan in a paper on the Mabo judgement contends that Berndt's description of Aboriginal interest in land "would seem to satisfy most of the tests of being a proprietary interest" (Brennan 1994:33), while Neate cites Maddock's analysis of evidence given in the Gove case as having shown that "it is unlikely that legally recognised proprietary rights in land would have been established" (Neate 1986:36). It would seem that over time the courts have become more flexible in their judgements on this issue and have moved somewhat in their opinion as to proprietary ownership. As was shown in the Mabo case judgement handed down by the High Court on 3rd June 1992

Woodward in Appendix D of his second report (1974) outlined a draft for the proposed new legislation, which according to Brennan (1994:33), was based on the suggested drafting instructions put forward by Mr F.G. Brennan QC, who was at this time the Counsel for the Northern Land Council - he later became Chief Justice in the High Court and in 1992 wrote the lead judgement in the Mabo decision. The definition of what constitutes "traditional Aboriginal owner/s" in the draft proposals is almost identical to that given in the 1976 Act. The 1976 Act does differ in some respects from the 1975 Bill that was introduced by the Whitlam government. The Bill sought to enable those Aborigines living in town or cities to benefit from land rights, and Woodward envisaged that the Land Rights Act would in time be applied to the whole of Australia not just the Northern Territory, but this did not become part of the Land Rights Act. The Bill also recognised that there could be more than one site of spiritual significance on any given area of land. This to was omitted from the definition of the Act.

The 1976 Act. Section 3(1):-

> 'traditional Aboriginal owners', in relation to land, means a local descent group of Aboriginals who-
> (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
> (b) are entitled by Aboriginal tradition to forage as of right over that land; (ALR(NT)Act 1976:4)

The inclusion of "local descent group" engendered further anthropological debate because "whereas the Berndts distinguish "local descent group" from "clan" (only the former is bounded by common descent), the Woodward commission equates them" (Keen 1984:25). Woodward did not specify patrilineal descent and, according to Keen, while this extended the definition of "traditional Aboriginal owner" it also distorted customary law (Keen 1985:24). Woodward was to comment in 1985 that the issue of the narrowness in respect of the definition of traditional Aboriginal owners "which has been raised in some academic quarters ... could cloud more important issues if it is not seen for the distraction which it is" (Woodward 1984:42). He went on to state one of his main concerns and that of those who were involved in framing the legislation was

> to identify a group of claimants in each case whose credentials were beyond argument and then if their claim succeeded , to adapt the English concept of the trust to ensure that all Aboriginals having an interest in the land, whether economic or proprietorial, in accordance with Aboriginal law, would have their rights protected (Woodward 1985:420).

Neate observes that "the concept and definition of traditional Aboriginal ownership has assumed more importance than Woodward might have hoped and, perhaps, than those preparing the legislation anticipated" (Neate 1989:39). This was because the definition was seen to establish a set of criteria which had to be satisfied and adapted by judicial interpretation. One of the reasons for this was put forward by Neate who commented that the words used were not technical terms of anthropology or terms of Art[17], but ordinary words and phrases from the English language which were to be interpreted in that way. He maintained that "the question of their meaning is one of fact not of law, to be resolved by the Aboriginal Land Commissioner considering them in the context of the Act" (Neate 1989:43). So in each case they were defined or determined anew.

For Neate (1989:43) the expertise and experience of anthropologists provided a valuable contribution to the legal process by assisting with these interpretations and redefining technical terms and ordinary usage of the language. However, while expert evidence was given as to the meaning and translation of technical terms relevant to the profession, the meaning of 'traditional Aboriginal owner' as proscribed by legislation was a legal term and as such, a question of law to be considered within this specific frame of reference. Keen alludes to this when he comments that

> The definition has its origins in anthropology, but it is interpreted by barristers and judges against a background of assumptions, principles and rules of statutory interpretation, with some striking consequences (Keen 1984:24).

Keen believed that this legal definition of "traditional owner" had in fact freed it from anthropological constraint, and the way in which the Commissioner applied the term had also extended it. This also gave the Commissioner more flexibility when applying the Act for without this latitude more claims would not have succeeded. During the land claim hearings each Commissioner interpreted the definition in his own way, taking a more inclusive definition of "local descent group", or following a narrow and more restrictive interpretation. This resulted on occasion in the production of Aboriginal evidence through the claim books which were

framed by the requirements of the Act, but were contested during the hearings by those opposing the claim, and disputed by the Aboriginal claimants when cross-examined.

While the anthropological discourse concerned the structure and composition of Aboriginal society, the Woodward commission had to consider the relevant wider issues; not only of Aboriginal social organisation, but what effect the proposed changes would have on Australian society as a whole and those vested interests in particular, such as the Pastoralists and their leases, mining organisations and their tenements[18], and the ownership of mineral rights. Woodward asserts that it was this latter issue which he had found most problematic and cause for concern (Woodward 1974:99). A number of submissions were made by the Australian Mining Industry Council for its members, which as Woodward remarked "include virtually all mining companies of any substance" (Woodward 1974:101). These were also the organisations and individuals who had the most to lose if Aboriginal groups were to have full control of the resources found on or under the land and they preferred therefore, to negotiate with the Government, rather than the Aboriginal owners who approached the issue of mining from the perspective of protecting their sacred sites, as well as the social and economic rewards gained from the industrial processes.

The mining companies (Swiss Aluminium Australia Ltd., Gove Alumina Ltd.) in a joint venture with the government, wanted to take over huge areas of land for mining. Woodward (1974:115) states that special mineral leases covered an area of 20,000 hectares[19] of land, with another 1800 hectares of land used for the development of the town of Nhulunbuy which already had 3,500 residents. However the mining company maintained that it was still only "marginally viable", due to the international structure of the industry and the cost of capital investment in an alumina[20] production plant estimated to be over $300 million.

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[17] A number of labels or categories applied and readily understood by members of the profession using them.

[18] In law any kind of permanent property, such as land or rents held from a superior – in Australia this usually relates to mining agreements.

[19] This is a metric measurement equivalent to 1,000 square metres or 2.471 acres.

[20] A compound aluminium oxide.

The position of the mining companies was, and still is, that "nothing should be done to stifle initiatives towards discovery and development" (Woodward 1974:101) and any changes in mining leases as a result of Aboriginal rights in land should be at no cost to them, but financed by the Government.

The submissions made by the various mining interests had a broad agenda, and as predicted by Stanner, the national interest was prominent: "wealth belongs to the whole community. No landowners should be in a position to lock away such valuable resources" (Woodward 1974:102). I am not convinced that the Aboriginal people who lived on the areas where minerals were found did want to prevent all mining. However they clearly indicated that they did want to protect those areas which they, and neighbouring Aborigines, considered to be of a sacred nature. They also wanted to be involved in the discussion and decision-making process.

In fact the Northern and Central Land Councils, which had been established on the recommendation of Woodward in his first report (1973:41), displayed considerable pragmatism in their approach to the thorny issue of re-negotiating agreements with those agencies who had occupied and used large tracts of land, and had been granted leases to these areas. The Land Councils acknowledged that there were instances when the Government would require land for a purpose which would ultimately benefit local Aboriginal communities and, as such, these projects should not pay rent on a continuing lease; hospitals, schools and civil aviation facilities were considered projects which came within this remit (Woodward 1974:21).

Essentially the Aboriginal people wanted to be asked and involved in the discussion process about how the land was to be used. Consultation with Aboriginal people in respect of land uses, leases, or where settlements and missions should be sited, had not been an integral part of the Government process. Wells (1982:83) demonstrates that under the guise of confidentiality the Government of the day and the Director of Welfare Northern Territory (C. Geise), deliberately withheld any information concerning the transfer of Yolngu land to the mining companies until all the conditions stipulated by the mining

company were met and legally binding. This meant that there would be no possibility for further negotiation by anyone, let alone the people of Yirrkala. They were faced with a *fait accompli*. Nothing could be done to change the decision which would impact considerably on their life, social organisation and community, and was the result of a process in which they had no part. Consultation with, and negotiations undertaken by, Aboriginal people or their authorised representatives were important issues for Mr. Justice Woodward, who believed it was essential that Aboriginal people were closely involved in all the processes which would have an impact on their spiritual and daily lives. (Woodward 1974:158)

A further element of the mining submission was that if Aboriginal people were given

> any form of assistance which would significantly set the Aboriginal people apart from the rest of the community [this]would result in the type of disruptive pressures which would be to the detriment of everyone, including the Aborigines (Woodward 1974:102).

This comment implied that there would be civil unrest as a result of Aboriginal recognition and any attempts to make reparations for past injustices. It suggests that the wider Australian public were unable or unwilling to accept the changing power differentials in Australian society, which was clearly not so; the referendum had demonstrated that a majority of white Australians were prepared to undertake social change, to acknowledge the injustices of the past and accept the different life-style of the first residents of the Continent.

Some of those who made submissions to the Inquiry in respect of mining, including the Northern Land Council (Woodward 1974:100), believed that the government had intended that the ownership of the minerals would go as a package with the land determination. The reference in the letters patent asserts that

> arrangements for vesting title in land in the Northern Territory of Australia now reserved for the use and benefit of the Aboriginal inhabitants of the territory, including rights in minerals and timber, in an appropriate body or bodies" (Woodward 1974:99).

This was not explicit enough for Woodward who had his doubts as to whether or not this important issue was in the remit of the Commission and considered it should really be governed by an Act of Parliament because of the long term

implications. He also reflected on what traditional laws and customs had to say on the matter, speculating that the only minerals which were important to Aboriginal people were water, flints and ochres, the latter especially because of their spiritual significance for religious ceremonies (Woodward 1974:99). Other minerals such as petroleum, magnesium or bauxite he considered held less significance for Aboriginal people as they were not part of the traditional Aboriginal mode of production and not used in ceremonies and ritual.

This interpretation was shown to be erroneous in the late 1980's and early 1990's when a number of disputes arose including the Coronation Hill debate. As Keen (1992) and Merlan (1991) were able to demonstrate in this instance, these minerals were part of the Aboriginal mode of thought and were of considerable importance in Aboriginal traditional belief systems. Their report prepared under the *Heritage Protection Act* showed that Jawoyn beliefs had been firmly embedded in sites of significance which were later found to contain valuable mineral deposits or other resources. These resources then became part of an emergent interpretation as to their significance for the Aboriginal people who held the land.

In the case of Coronation Hill the Jawoyn maintained that this particular area, which was found to contain gold, had been recorded by early ethnographies, and was part of the Bula complex and was considered to be 'sickness country' (Merlan 1991; Keen 1993). The Jawoyn were not surprised when gold was discovered, seeing the gold as a physical manifestation of Bula's essence or life force. However, the Jawoyn doctrine in respect of the area was, if the ground was disturbed near the Bula site there would be a catastrophe, which would endanger not only Jawoyn people but all Aborigines and others who went there without carrying out the appropriate ceremonies. Mining and blasting was carried out initially in a graduated way, and while there was no consistency of opinion between the Elders, after some time the anti-mining view prevailed.

This was just one illustration of how the Aboriginal Land Rights (NT) Act 1976 had formulated and embedded the concept of 'tradition' not only in the legal system but also the national psyche. The dichotomization of Aboriginal society

into those "traditional" Aborigines who live in isolated places and people of Aboriginal descent who live in towns and cities was consolidated in the legal process when the Act omitted Woodward's recommendation that the Land Councils should "investigate and make claims, reports or representations concerning the land requirements of Aborigines in towns" (Woodward 1974:158). This placed Aboriginal people in a position where they were considered to be firmly located culturally in a mythic hinterland, unchanging and static. It demonstrated that the systems which have operated within Australian society have found it difficult to acknowledge the dynamic and adaptive nature of Aboriginal society over time. The dynamic nature of 'tradition' was to become an issue in some of the claims resulting from the Act.

Merlan, remarking on the Coronation Hill inquiry states

> I was struck by the fact that the notion of 'tradition' was used by a number of participating experts and commentators in ways which opposed it to modernity and denied its legitimate relevance to Aborigines today. This was partly done by formulating 'tradition' as purely cultural, rather than in any sense social or historical, rather in the manner of public opinion" (Merlan 1991:341).

Cowlishaw argued that the approach of earlier anthropologists such as Elkin and to some extent the Berndts (Catherine and Ronald) as students of Elkin, also contributed to this conceptualisation of Aboriginal people being firmly located in the past or a constructed cultural past, commenting that

> their writings about changes that were occurring among Aborigines accepted a simplistic dichotomy between 'full bloods'[21] and those who had lost the essential elements of that heritage, that living link with their cultural past (Cowlishaw 1992:24).

Cowlishaw goes on to say that "Traditional studies have reinforced rather than challenged the popular judgement that only remote 'full bloods' are real Aborigines" (Cowlishaw 1992:25). This discourse remained and is now firmly embedded in the Native Title Act 1997 where continuity of connection has to be established between the applicants and the area of land in the application.

It is clear from the second report of the commission that it was Mr Justice Woodward's intention to bring about both social justice for Aboriginal people and to begin a process of radical social change within Australia as a whole.

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[21] Refers to Aboriginal people whose parentage was wholly Aboriginal.

He realised early on in the process that he had to tread a very fine line between those who wanted change immediately and those who felt severely threatened by the proposed alteration to the status and power of Aboriginal people.

The research undertaken in the past by anthropologists was able to demonstrate that Aboriginal groups had a complex system of land ownership that had been in place prior to the influx of white settlers. Anthropologists were able to demonstrate that this system of social organisation, ownership and boundaries was understood and recognised by the different Aboriginal groups. Anthropologists were involved in the shaping of the Act and anthropological theory went some way to under-pin the Act in respect of the definition of "traditional Aboriginal owners". They were to become pivotal in the legal processes of the Act. However a number of anthropological debates have continued since the Act was implemented. In particular these discourses were concerned with what constituted a "traditional" Aboriginal owner, the most relevant anthropological markers for Aboriginal groups, whether anthropologists should be expert witnesses, and if anthropologists were advocates for Aboriginal claimants or objective observers and recorders of Aboriginal culture.

Chapter Three.

The Land Claim Process.

Introduction.

In this chapter I intend to discuss the ways in which anthropologists have contributed professionally to the land rights process through the construction and production of claim books[22], reflecting on why this method of recording was used. I will also consider the role and contribution, if any, these documents made to a greater understanding of Aboriginal social organization, both during and after the land claims process. While claim books became an established part of the legal process enshrined in the practice of the Act, they reflected European concepts of knowledge production. These contrasted sharply with Aboriginal concepts of evidence and expressions of title in respect of their ownership of land, which takes the form of songs, dances and the physical manifestations of ownership found in the sacred objects (Williams 1986; Morphy 1991; Keen 1994). I will consider a number of claim books – the 1978 Warlpiri and Kartangarurru – Kurintji, 1988 Mclaren Creek pastoral station and the 1994 Tempe Downs and Middleton Ponds/Luritja land claim. The Governor General, Sir William Deane, handed the land of the latter claim back to the traditional owners on 29th July 1999.

The claim books when tendered in evidence became, as texts, tools of the legal system. They became the objects of intense scrutiny by the lawyers and the legal process as soon as they were submitted in evidence. They were seen as identifying the traditional Aboriginal owners of the land under claim, establishing in written form Aboriginal relationships to the land under claim, and substantiating the bases of the claim. The documents were seen as translating and formulating a previously oral, spiritual and complex culture into an acceptable form of knowledge for the legal system and the non-indigenous population. However these texts were regarded with extreme suspicion by those opposed to

[22] The claim book is the Aboriginal evidence usually compiled by one or more anthropologists that contains the details of the area under claim, sites and formulates the concepts of Aboriginal land tenure.

land claims as they were seen to provide an authenticated version of Aboriginal beliefs and culture compiled from oral descriptions not given under oath.

The detractors of these submissions rigorously scrutinized and dissected the Aboriginal evidence to detect any inconsistencies with the texts provided by the researchers. During the hearings, anthropological theories, and the practitioners who compiled these books, were subjected to the same level of examination and testing. I intend to reflect on this adversarial legal process which scrutinized not only Aboriginal rights in land, anthropological methodology, and anthropological theories but also the anthropologist's credentials and expertise in compiling, writing and sourcing the documents submitted in evidence.

The *Aboriginal Land Rights (Northern Territory) Act 1976* was enacted by the Fraser government and came in to operation on January 26th 1977, when the Hon. Ian Viner was Minister for Aboriginal Affairs. After the Act was entered into law Mr. Justice Toohey, the first Aboriginal Land Commissioner, held a two-day hearing in May1977. During this hearing Practice Directions[23] were formulated. I will only reflect on those aspects of the Directions concerning the compilation of the claim books, the collection of the anthropological evidence, its submission for the Commissioner and how it was used and examined during the Hearings. This is because the Practice Directions were extensive, covering all aspects of the land claim process including how the claim was to be conducted and by whom. Over the lifetime of the Act these Directions have been reviewed on a regular basis because of the changing nature of the individual claims and the experience and personal interpretations of the individual Commissioners.

When the Bill became law some titles to land were granted in fee simple[24] to Aboriginal Land Trusts under Schedule 1 of the Act. Under this schedule, land

[23] These were created under Section 51 of the 1976 Act which gives the Commissioner the powers to "do all things necessary or convenient to be done for or in connexion *(sic)* with the performance of his functions" (ALR Act:1976:82).

[24] Freehold title.

was granted without the need of a land claim and became the responsibility of the Land Council which covered the area in which the estates were located. In practice Schedule 1 lands were mainly Aboriginal reserves.

Under the Act only certain types of land could be claimed, namely, unalienated Crown land[25], and land outside town boundaries which was held by or on behalf of Aborigines and not by the Crown (Neate 1989:18). A number of land claims were set in motion as soon as the Act became law. These claims were supported by the Central and Northern Land Councils as this role fell within their ambit of "representing Aboriginal people in negotiations with the Government on all matters relating to land rights in their region" (Woodward 1974:68).

From the beginning of the land claim process the the Northern and Central Land Councils, employed professionally qualified anthropologists, linguists and historians to both gather and collate the information required by the claim process and to write the detailed statement of claim on behalf of the applicants. In the Gove Case, W.E.H. Stanner and R. M. Berndt, being the most senior Aboriginal anthropologists at this time apart from A P Elkin, were selected on the basis of their professional standing, their in-depth knowledge of Aboriginal anthropology, their long standing connections with Aboriginal people and, in Berndt's case, the area under claim. The anthropologists selected to undertake the research for land claims tended, on the whole, to be young anthropologists who were completing or had completed higher degrees and were at the beginning of their careers in academia, or working as anthropologists for the newly formed Land Councils. Not all of those researching the individual land claims had been closely involved with the Aboriginal claimants but in general there was a member of the team who had had recent experience of the people and the area under claim.

This recent localized knowledge overcame to a degree some of the criticisms laid against the anthropologists in the Gove case (Blackburn 1971). However, this association with the claim group provided the legal Counsel for those contesting the land claim with a different standpoint from which to cross-examine and

[25] This refers to Crown land in which no person, other than the Crown, has an estate or interest. This does not include land within the boundaries of a town. S.3. ALR (NT) ACT 1976.

challenge the objectivity of the expert witnesses, because of their past affiliations with the claimants, or specific Aboriginal communities. The anthropologists and other professionals who were involved in the preparation of the reports were challenged as to whether they should be regarded as expert witnesses under the practice directions of the Federal court which required an expert witness to be impartial. This argument had been mooted in the Gove case and had been dealt with by Mr. Justice Blackburn quite effectively (Blackburn 1971:21). However Counsel for the opponents in the ensuing land claim cases continued to question the impartiality of the evidence provided by the professional witnesses. Justice Toohey commented on expert witness' impartiality in the report of Borroloola claim in this manner

> no doubt both men were sympathetic to the interests of Aboriginal people and Mr. McLaughlin was inclined to wear his heart on his sleeve. Nevertheless on matters going to traditional ownership I have no reason to doubt the truth of what they told me ... At the same time it is true that too close an involvement of an expert witness with the party calling him is likely to lead to misunderstanding (Toohey 1979:12).

However the Judge did reflect that "this misunderstanding" might have been avoided if "each had confined his role to that of witness and had not been responsible for the compilation of the claim book...which was in essence the applicant's written evidence" (Toohey 1979:12).

The most recent Federal Court practice directions are quite explicit as to where the primary obligations of an expert witness lie. The guidelines for expert witnesses and the form their evidence takes in Court proceedings issued by the Federal court are extensive but not exhaustive. They do detail the minimum standards of what is expected of the experts called in a case. The general requirements placed on expert witnesses by the Courts today are

- An overriding duty to assist the Court on matters relevant to the expert's area of expertise.
- An expert witness is not an advocate for a party.
- An expert witness's paramount duty is to the Court and not to the person retaining the expert. (Black 1998:2)

Practice directions also stipulated the form expert evidence must take. Mr. Justice Toohey was quite explicit in his first practice directions in respect of the 1976 Act in that he was prepared to accept evidence which could be considered by some to be hearsay and was proposing to be more flexible than the usual rules of

evidence allowed. There was a proviso as to relevance being tested during the hearing

> There will be no strict adherence to the ordinary rules of evidence. In particular as a general proposition hearsay evidence may be admitted, the weight to be attached to it to be a matter for submission and determination. Relevancy will be the controlling test for the admissibility of evidence (Toohey 1977:10).

Mr. Justice Toohey also instigated the hearing of Aboriginal evidence outside the formal, and for some, intimidating setting of a conventional court. He did this by taking Aboriginal evidence on the land being claimed even though this was a time consuming exercise (Toohey 1977:9). He was also prepared to accept evidence given indirectly by the Aboriginal claimants through videotaping. He engaged the services of an anthropologist for most of the claims that he heard, to assist him in verifying the content of the materials. He commented in the Borroloola report that it seemed to him that,

> the most appropriate method of checking the claim was to submit the evidentiary material to an anthropologist, preferable someone familiar with the area...It may be that in the case of other applications some different approach will be more appropriate (Toohey 1979:3).

Mr. Justice Toohey clearly intended to apply the Land Rights Act in such a way that Aboriginal people would feel able to use the legal system to claim land, while demonstrating to those who opposed the claim that the due process of law had been applied in a transparent manner.

Claim Books - Three case studies.

The Land Rights Act was a unique piece of legislation and there was no prescribed format established for the claim books, but the influence of anthropology and the other research-based professions initially involved in the land claim process, is evident in the way claim books have been presented and written. The format of the claim books and the way they were written demonstrated the experience of anthropologists in the writing of ethnographies and undertaking the sophisticated analysis of different societies and cultures. The amount of detailed evidence required by the legal system to establish the claimant's spiritual affiliations to land was considerable and anthropologists, linguists and historians were ideally qualified to be part of this process of information gathering. The claim books became the accepted mode of assembling

the detailed evidence required by all parties in the claim process and were considered to be the key indicator as to how prepared the claimants were in order for the claim to proceed.

All the professions involved had extensive expertise in the compilation of intricate detailed documents from the research data they or others had gathered. They were experienced in analyzing data, interpreting their significance and showing how they were substantiated by the available literature on this specific area of study. The researchers were cognisant of the need for bringing together the many diverse pieces of information obtained from their informants. In this way they could explicate and identify spiritual connections and outline the descent groups in the construction of a coherent document which provided a logical and well thought through discourse able to withstand the scrutiny of their peers, other professionals and the rigorous cross-examination by lawyers during the hearing.

The claim books underpinned the Aboriginal evidence. The research and the subsequent claim book were constructed so as to establish a coherent model of Aboriginal ownership within the terms laid down by the Act and form a framework on which the detailed Aboriginal evidence was overlaid. As Peterson *et al* (1978:4) acknowledge in the Warlpiri and Kartangarurru-Kurintji claim book presented in evidence, "We would emphasise however that we are not the authorities on the matters of land ownership only the recorders on behalf of the traditional owners".

The fieldwork component of higher degrees placed anthropologists in a privileged position as they had been able to establish networks and close ties among remote Aboriginal communities. This relationship did impose a double bind on them and the data gathered, because on the whole they were perceived to be representing the claim group. Yet the legal process and the expert witness role of the proceedings required them to be objective, impartial loci of knowledge. This is an issue which has not been fully resolved to this day and periodically the debate is resurrected in articles in the popular press as well as academic journals (Brunton 1999; Maddock 1999.)

It is important to note that while claim books may superficially resemble ethnographies, in that they are the transcribed distillation of many fragments of information gathered from observations and conversations from the field, they can not be considered such for a number of reasons. The important differences to note are: firstly, the purpose for which they were compiled; secondly, the content and context in which the information is gained; and thirdly, the length of time the consultants had to complete the project.

Some of the very early accounts followed very much the way in which the ethnographies are compiled from fieldwork notes for higher degrees, such as Doctorates, and were intended to undergo peer review. The claim book that was prepared for the Borroloola claim fell into this category. Here, the anthropologist made the assumption that the reader had a strong background and understanding of Aboriginal belief systems and kinship studies although this was not the case for all readers. However the lawyers who were involved in claim proceedings required the claim books to address the terms of the Act, and not the nuances of anthropological thought (Toohey 1985:164). The researchers and authors of the claim book were expected to address the clauses of the definition of traditional Aboriginal owners as it was set out in the Act. They did this in varying ways to substantiate and place in context the basic structures of Aboriginal society.

The claim book had to ascertain all aspects of the claimant's case relevant to the land under claim. A history of the area was required including the impact of European contact on the local Aboriginal groups; the current legal status of the land[26], with maps and charts depicting the physical features of the land and the actual area of land under claim. Aboriginal genealogies, which were confidential in later claims, also had to be collated and constructed to show the structure of the local descent group or groups included in the land claim. The text had to explain for the Commissioner and the other parties' lawyers the social structure of the claim group, the basis of their connections in the country being claimed, how they had acquired these traditional rights and responsibilities, and how these were exercised in respect of the specified land. It had to identify those sacred

[26] Schedule 1, 2 and Crown Land etc.

sites of significance that demonstrated the common spiritual affiliations of the claimants, and to also establish those who had primary spiritual responsibility for the area.

Details of the benefits for claimants, which were expected to arise from a successful claim, were also included in the documentation. The maps and charts had to show not only the physical aspects of the landscape, but also where sites of significance were located, either on, or in the vicinity of, the land under claim and the routes or Dreaming tracks taken by the mythical Ancestors as they moved over the land and created the land formations. Together, all these elements were put forward as evidence of connection to the specific areas of land under claim in order to fulfill the criteria for traditional ownership as laid down in the Act (ALR(NT) Act 1976). Aboriginal people also had to demonstrate not only considerable depth of knowledge about the land and the associated stories but also the strength of attachment, in a traditional sense, as shown by such matters as the frequency of their visits to the land and the holding of ceremonies in these areas.

Over time the genealogies and maps of sacred sites have been excluded from the claim books because of the confidential nature of the material. They have been presented in evidence as separate restricted documents not for public perusal. Aboriginal claimants were afraid that information as to the location of sites would expose the Aboriginal owners to danger and the sites could be damaged and sacred artifacts removed by outsiders as had happened in the past by explorers and station managers (Sackett 1994:21). This demand for secrecy in respect of sites by the Aboriginal claimants has come under constant criticism by the mining organisations and pastoralists, who maintain that their livelihood and exploration endeavours are constantly undermined as a result of this.

They have also been critical of the fluidity inherent in the Aboriginal concepts of boundaries. This is because for Aboriginal people the spiritual strength of a site may not reside just in the central core, or one clearly identifiable spot but the power embedded in these sites is strongest at the centre and diminishes outwards from the location. It could be described as being like the movement of the ripples

which emanate from a pebble dropped in to water. Peterson *et al* (1978:6) in the Warlpiri and Kartangarurru-Kuintji claim book contended that, "To isolate sacred sites from the country-side at large is like treating the eyes of a potato as the potato itself". The claimants saw "the whole landscape as religiously significant" (emphasis in original).

Using a wide range of sources and data the claim book followed the criteria laid down and formulated in the Practice Directions issued by the individual Commissioners. The land claim book is required to demonstrate that the claimants are the traditional Aboriginal owners of the land being claimed. These books were not the primary or only evidence as to Aboriginal rights in land and the Aboriginal community's internal relationships. These had to be substantiated by the testimony given at the hearings by the Aboriginal claimants and others. The testimony given was then scrutinised through cross-examination by the opposing council.

The Warlpiri and Kartangarurru-Kurintji Claim Books.[27]

In December 1976 Dr. Nicolas Peterson along with another anthropologist Dr. Stephen Wild and a linguist Dr. Patrick McConvell, under instructions from the Central Land Council (CLC), began the compilation of the first claim book to areas of traditional land on behalf of the Warlpiri and Kartangarurru-Kurintji. All had considerable experience of working with the Aboriginal people through extensive fieldwork and research in the area being claimed. All three were academics in major anthropological institutions. Rod Hagen, an anthropologist employed by the Land Council, assisted with the research and substantiated the data being given by the claimants. During the later stages of the claim he edited

[27]I have used the same nomenclature as the authors applied in the third book completed for the land claim. This is different from that adopted in the first two books, but the same orthography as used by Mr. Justice Toohey in the preparation of his report on the land claim. He qualified this usage in his report on the claim because of the inconsistencies in the usage of some of the words and on the materials such as maps, and as a result "very many names were mentioned both of persons and of places. From time to time different spellings were used depending upon the person giving evidence and upon the source of the material referred to...it was not always clear what form of spelling had been used (Toohey 1979:3)

the third claim book given in evidence because of the academic commitments of the original authors.

The Walpiri and Kartangarurru–Kurintji land claim books were refined and underwent considerable revision before submission as evidence for the Hearing. Prior to the hearing three books had been compiled, a procedure which in total, took almost two years.

The second book was initially submitted to the Commissioner in order for him to set a date for the Hearings to begin. The submission of the book demonstrated that the claimants were ready to proceed and the book would then be given to all parties to the claim 4-6 weeks before the Hearing was due to commence. This enabled the lawyers and other interested parties time to examine the material in the book, prepare their case and formulate any challenges to its contents.

The book was clearly framed by the terms of the Act in order to establish the Aboriginal claimant's case, demonstrating that they met all the criteria laid down in the Act and to which sections of the Act the evidence related. Hagen states in the third book that the original book was "produced in haste before the ALR (NT) 1976 had been passed", the second book "incorporated ammendments [*sic*] necessary to fit the framework provided by the framework of the Act and some information obtained in the period between preparation of the initial claim book and the beginning of the hearings" (Peterson *et al* 1978:i).

The third book is very detailed and demonstrates that during the period of research more and more Aboriginal people were prepared to discuss their spiritual affiliations and give details of their personal attachment to the land under claim to outsiders. The numbers of claimants rose. In the first book only sixty-five men were initially named as traditional owners of the different areas of the land under claim. In the second not only were men named but also women who were able to demonstrate that they too had a claim to ownership under the criteria of the Act. In the third claim book children were also included, and by the hearing more than 1200 individuals had been identified as claiming traditional ownership of the different areas of land under claim. These claimants shared no

more than sixteen 'surnames' (Toohey 1977:8). The inclusion of children from the maternal line instead of just from the male line set up a challenge to the orthodoxy of some anthropological theorists who considered the descent system within Aboriginal society as strictly following the patrilineal model.

That so many people were coming forward during the compilation of the claim book could have been viewed as highly suspicious by those opposing the claim, but Mr. Justice Toohey (1979:12) commented that he found "nothing sinister in these changes. It would be quite unreal not to expect some to occur having regard to the vastness of the area involved". Peterson and his co-writers provided substantive data commenting in the final book, "We are confident that the evidence set out here is highly reproducible" (Peterson et al 1978:2).

This reproducibility was ascertained by the cross-examination of the witnesses and at meetings and visits to sites prior to the formal hearings. These demonstrated the legitimacy and authenticity of the evidence. Toohey (1979*b*:12) in his report observed that the Aboriginal claimants' ability

> to identify places and describe dreaming paths was impressive. So too was the detail with which they spelt out the membership of family groups... This emerged from so many people...that there can be no doubt as to the genuineness of the overall picture.

During the researchers' fieldwork for the claim book Aboriginal men would have been their main informants. This was because of the nature of the politics of Aboriginal society and culture with its strict protocol in decision making and who has the authority and permission to speak about secret sacred issues, and the fact that the researchers were male. The inclusion of women in the claim was of major importance, as women were diffident when discussing "women's business"[28] with men, especially white men. While Aboriginal women may know the significance of the sacred sites on the land if only in order to avoid them, they would not have been prepared to speak about "men's business" or "women's business" to white males.

[28]This refers to gender specific rituals and religious knowledge.

They were more disposed to speak to women anthropologists in respect of gender specific issues and this was acknowledged in later claims. It was accepted practice for there to be both a male and a female anthropologist involved in the collection of information. However, in these early claims the inclusion of women's secret sacred knowledge was not seen as being as significant as that given by men due to the phrasing of "traditional owner" as set down in the Act which, while not gender specific, was initially read as indicating male authority, as well as the acceptance of male dominance in respect of Aboriginal customary law. Not withstanding this, the Commissioner acknowledged in his report that "The vitality of ceremonial life is by no means confined to men... [Women's] concern with traditional and ceremonial life came through clearly" (Toohey 1979*b*:46).

In some cases the information gathered was gender specific and restricted as to who could read it. This issue of gender restricted evidence was to grow throughout the life of the Act. Each commissioner brought his own interpretation, and in some cases prejudices, to bear on the importance of Aboriginal women's business, the restricted nature of such, and how it was to be handled within the legal process by the male lawyers.

Previous research in Aboriginal communities from Central Australia (Meggitt 1964) had shown that in some Aboriginal societies individuals have dual roles. They are traditional owners or *kirda* of an area of land, and manager or *kurtungurlu* of another estate. The *kurtungurlu* claim their spiritual affiliations and responsibilities with the land through their mother. It is the "managers" - *kurtungurlu* - who are responsible for the production of ceremonies for their *kirda*. Peterson *et al* demonstrated how these relationships and responsibilities were fundamental in the concept of reciprocity within Aboriginal communities: both were required to carry out ceremonies, rituals and maintenance of the sacred sites. The inclusion of women in the claim reinforces the partnership and relationship of the *kirda* and *kurtungurlu*. It did this by reinforcing the women's relationships to their father's country and establishing their children's connections to the same through their mothers.

The claim book also revealed another important relationship between the different groups which was referred to as a "company relationship". This association pertained to Dreaming tracks that crossed the land of different, but related, Aboriginal groups. Each community would hold some responsibility to maintain the sacred sites, ceremonies and rituals related to the Dreaming track of their foundation Ancestor. The proximity of the land to each of the different Aboriginal groups who were engaged in this "company" relationship meant that the male members would hunt and travel extensively through each other's land. This concept provided substantive data, which shaped and reinforced anthropological thought on the depth and complexity of Aboriginal society. However it was noted in the claim book that the closeness of this relationship meant that "it was difficult to separate groups into neat divisions in some areas" (Peterson *et al* 1978:ii). This new information concerning Aboriginal relationships required changes to be made to the claim book to accommodate this new information.

In the second book family trees or genealogies of the claimants were included as required by the Act. However these were not present in the third book, but were presented separately to the Inquiry, as previously mentioned, so as to maintain some confidentiality for the families involved. The book gives a chronological history of sightings and contact by travelers and explorers with Aboriginal people in the area from as early as 1882; this was to establish the strength of attachment to and occupancy of the land over time. A number of conflicts were recorded when Aboriginal people and settlers fought, and as a result, the Aboriginal people moved off their land in fear, or were forced from it to make way for the miners during a gold rush, or for cattle on pastoral leases.

The maps prepared for the claim depicting the Dreaming tracks and the sites showed the extent of the land used by Aboriginal people and its boundaries. As I have stated above the Aboriginal concept of boundaries is different from that of the Euro-Australian land tenure system in that Aboriginal concepts do not fit neatly into the straight line or fence concept inherent in the system introduced by the white settlers. This land claim also demonstrated how Aboriginal groups managed fission and succession within Aboriginal society showing that on the

whole Aboriginal culture and beliefs changed over time and were not immutably fixed and in some distant past.

Mr. Justice Toohey commented in his report (1979*b*:13) that the distillation of all the material was a complex procedure, which was made easier by the compilation of the revised claim book. Changes continued to be made in respect of the claimants up to and including the final address of the counsel for the Central Land Council and the claimants. This demonstrates clearly how at the beginning of the legal process for land rights all parties had to come to terms with the flexibility required by the Act.

The claim book shows a very different way of life from that of the "ordinary Australian" of the time, not just because of Aboriginal custom but the poverty and fragility of their situation. Peterson details that for most of 1977, twenty-two people were financially dependent on "a single old age pension, child endowment and a forty dollar per fortnight ration order at the Yuendumu Social Club" (Peterson *et al* 1978:78). It showed considerable fortitude to remain on their land in the face of such adversity. The claimants had very modest aspirations. They wanted to develop an autonomous community in which they could address their basic needs, provide an adequate water supply, begin a gardening project and acquire reliable transport in the form of a truck and a four-wheel drive.

The land claim book provided an emphatic and concise argument for Aborigines in respect of the criteria laid down in the Act. It demonstrated how vital land is to the construction of Aboriginal identity, regardless of whose name is on the title deed for a specific area of land. Peterson *et al* quote at some length an article written by Galarrwuy Yunupingu for the October edition of Land Rights News in which he expresses the sense of identity that Aboriginal people gain from their land. In this article Yunupingu states:

> The land is my back-bone. I only stand straight, happy and proud and not ashamed about my colour because I still have land...I think of land as the history of my nation. It tells us how we came into being and what system we must live. My great ancestors who lived in the times of history planned everything that we practice now (Peterson *et al* 1978:98).

Peterson also shows how Aboriginal people believed that moving back to their homeland enhanced their quality of life. Reflecting on the lives of those people living on the Outstation based close to the site "Jitirlparnta". He writes

> Above all they are living on their own country. The men regularly visit the major sites in the area to fulfil [*sic*] their responsibilities and in so doing reaffirm their own conception of their reason for existing. They are no longer "guests" in a place owned by other Aboriginal men and women (Peterson *et al* 1978:80).

The team who compiled the third edition of the Warlpiri and Kartangarurru – Karintji claim book believed that with a longer research period they would have been able to locate and describe all of the ancestral tracks in the area and "do justice to the extent of the traditional owners' ties to the area they own" (Peterson *et al* 1978:101). The authors reiterated that because of the constraints of time placed on them the claim book was "only a minimal claim" (Peterson *et al* 1978:101). This indicated that it was inevitable that some of the claimants in this action would instigate other land claims in the future because they believed and could demonstrate that their "traditional" land extended beyond the boundaries of this claim (Peterson *et al* ii).

McLaren Creek Land Claim –Ten years on.

The claim book for the above land claim was compiled by Keen, Koch, Stead and Alexander, and submitted in May 1988. The claimants belonged to four groups – Warupunju, Kanturrpa, Karlanjarrangi-Wakurlpu-Waake and Mirtartu and the total number of applicants involved in the claim was 516. Mr. Justice Olney submitted his report, findings and recommendations to the Minister of Aboriginal Affairs on 28th February 1990. The land claim concerned a pastoral lease, McLaren Creek, and as Keen *et al* acknowledged, arose directly from the earlier Warumungu land claim. The Warumungu claim was in respect of areas of unalienated crown land in the Tennant Creek area of the Northern Territory (Bell 1986:202). Keen *et al* notes that "McLaren Creek pastoral lease is embedded in the general region within which the areas claimed in the Warumungu land claim lie" (Keen *et al* 1988:1).

Because of this "embeddedness" and its importance on the practice of those anthropologists involved in the McLaren Creek claim it is necessary to give a short history and account of some of the contentious issues that arose during the Warumungu land claim, and the repercussions it engendered for anthropology and anthropologists involved in land claims.

The Warumungu land claim, heard by Mr. Justice Maurice, had been extremely contentious and controversial, not only for the Aboriginal community who put forward the claim, but also the anthropologists and other professionals who undertook the research. Bell, one of the anthropologists who worked on the Warumungu claim, ascribed this to the "legal morass" and delays caused by legal challenges. She attributed these delays and legal challenges to the Northern Territory Attorney-General who "had been complaining that the documentation provided by the claimants was inadequate" (Bell 1986:202). Eighteen months into the claim proceedings, after various decisions had been made and, according to Bell, over 5,000 pages of transcript had been produced at the various hearings, the Central Land Council and seven researchers involved in the claim were served with subpoenas to produce all their field notes.

This was the first time since the introduction of the Act that researchers on land claims were requested to produce the actual field notes made during their time in the field. The basis of this request came from counsel for the NT, Ian Barker QC, who contended that his clients, the Northern Territory Government, believed that the evidence given by anthropologists was in fact hearsay. He conjectured that if the original field notes were made available to the hearing, these would show that there were contradictions between the initial information supplied by Aboriginal claimants and what the anthropologists had written up in the claim book. Any discrepancy would then demonstrate that the anthropologists had been subject to undue pressure from their Aboriginal informants so as to maintain Aboriginal cooperation in future research projects. According to Bell, Commissioner Maurice also saw "any denial of opportunity to examine evidence at source to be a frustration of the hearsay rule". He also demonstrated that he concurred to some degree with counsel for the NT when he noted:

> It is only when a court has people before it who have an interest in asserting and an interest in denying an issue that the real truth is likely to emerge. (Bell 1986:204)

Bell, in her article, went on to question the purpose behind the hearing "Is it a search for truth or an enquiry to establish the *bona fide* of those asserting traditional ownership in accordance with the provisions of the legislation?" (Bell 1986:204). This again raised the issue of a conflict of interest between the anthropologists as compilers of the evidence for Aborigines, their role as impartial expert witnesses of the court, and the intense personal scrutiny they had to endure. Even after ten years of working within the Act and thirty claims concluded, these issues continued to take up an extraordinary amount of time and the finances of the hearings. The professionalism and independence of those who worked with Aboriginal people remained an enduring target for accusations of advocacy and partiality on behalf of the Aboriginal claimants.

It is important to note that the return of land to traditional owners had, and still does have, considerable political and financial ramifications for the people of the Northern Territory. At the time of the Warumungu land claim Barry Tuxworth was not only the Chief Minister of the Northern Territory but also the Member for the Tennant Creek electorate where considerable tracts of land had already been handed back to Aboriginal traditional owners. There were concerns in his electorate that the town of Tennant Creek "might soon be surrounded and thus constricted by inalienable land controlled by Aborigines" (Duncan 1985:36). The court case was estimated to be costing the Northern Territory government upwards of $4,000 per day, the CLC had spent $1 million and, at its height, there were twenty five lawyers involved with the claim hearing (Duncan 1985:36). Duncan contends that the reason for the NT government's aggressive and hostile stance was due in some part to the presentation of the case through the Warumungu claim book which had been "the source of numerous hitches" and according to him an unnamed anthropologist stated that:

> the claim book produced by the CLC in the late 70s was more a heart-on-the-sleeve rendition of Xavier Herbert's Poor Fellow My Country than a solid piece of anthropological evidence. (Duncan 1985:36)

Duncan then goes on to write that as the hearing date approached the CLC "lost its nerve" and called on a senior anthropologist, Professor Diane Bell, to review

the claim book. The anthropologist "rejected it". As a result of this a new claim book was constructed and written by the "council's permanent anthropological staff". It was because of the differences between these two documents that the NT's counsel was able to severely challenge the anthropological evidence during the adversarial processes of the hearing and bring the anthropologists into disrepute. The dispute again centered on whether the anthropologists were merely reporting what the Aboriginal claimants had told them, or whether they were impartial observers of Aboriginal social organisations and had analyzed and critiqued the data and information in an objective scientific manner as befits academic anthropological research. Again it was the professionalism and impartiality of the "experts" called by the claimants which was called into question and scrutinised. However in the Warumungu report handed down by Mr. Justice Maurice in 1988, three years after the hearings, he commented:

> When the main body of evidence in connection with this claim was taken in early 1985, it soon became clear that around Tennant Creek there was land to satisfy everybody's aspirations – except the Warumungu. Sadly, the Northern Territory has not recognised the moral strength of Aboriginal land claims or, indeed, the fundamental place belonging to land has in shaping Aboriginal self-identity. (Maurice 1988:viii)

It was, and continued to be, the Northern Territory government's policy to challenge every land claim regardless of its merit. Later in his report Maurice reflected on the contentious nature of the request for original field notes to be produced

> The exercise did not produce materials damaging to the claim; as it turned out, what was being covered up was a lack of skill and overall direction in its preparation. This, unfortunately, led to a good deal of unnecessary suspicion ... some of the blame must be laid with the CLC (Central Land Council) for failure to engage an anthropological consultant with the skill and experience required to co-ordinate and supervise the information gathering exercise, and to analyse the results (Maurice 1988:13).

It was against this background of dispute, conflict and confrontation, as well as the challenging of anthropological evidence and the anthropologists per se, that Keen and Koch were approached to complete the claim book on the McLaren Creek Pastoral lease claim. Keen had no prior personal involvement with the claimant group but had gained experience on the construction of claim books by undertaking the anthropological research for a land claim and completing peer reviews of other claims during the ten years the Act had been in operation. His major area of doctoral research had been with the Yolngu in north-east Arnhem

Land (Keen 1994). Keen was very aware that his field notes could be subpoenaed as they had been in the Warumungu claim and so he was careful to periodically summarise in his notes how the data he had collected related to the Act.

The McLaren Creek claim was to "alienated Crown land in which all estates and interests not held by the Crown are held by or on behalf of Aborigines" (Olney 1990:1). The lease had been purchased by four of the McLaren Creek claimants in 1980. At the time of the purchase they created a trust in which their shares and any accrued interest and dividends were "held upon trust for the persons who are traditional owners of the land ... namely the local descent group of persons" (Olney 1990:9). Under the terms of the trust the beneficiaries had to be Australian Aborigines and have primary spiritual responsibilities and common spiritual affiliations for the specific site and land.

The McLaren Creek claim book followed the established format of the early books. It opens with a history of the area, detailing the recorded contact with some early explorers and the responses this contact elicited from Aborigines living in the area. In the main this was violent and could be interpreted as the Warumungu challenging the rights of outsiders to cross and use the resource of their land (Keen *et al* 1988:4). The history tells of the advance of white Australia into the Aboriginal lands and the impact this had on Aboriginal society in the area. It details the coming of the telegraph line, then the various waves of prospectors and miners, followed by the issuing of pastoral leases and the arrival of sheep and cattle, with the resultant destruction of Aboriginal water-holes and soaks. Some of the early leases turned out not to be feasible due to drought and the distance cattle had to be moved for sale, but Aboriginal hostility was also given as a reason for the abandonment of these cattle stations (Keen *et al* 1988:8).

The claim book provides details of the ways in which white Australians imposed a cruel and harsh regime on local Aboriginal workers. It shows how Warumungu people were treated as trespassers on their country, and how a lack of understanding of Aboriginal society and its Laws by government officials exacerbated tensions between different groups who were being forced to live together at Warrabri settlement, which was on Kaytej country - this lead to a drift

from the settlement back to their own country. Aboriginal people were also employed at various times during this century in the mining of wolfram[29], which was found in the area, but such employment was only available when the price was economic enough for extraction, or it was needed for the war effort.

During 1935 gold was discovered in an area which was close to, and even encroached in to, an Aboriginal reserve which was used for hunting and traditional ceremonies by the Warumungu. Without consultation the reserve was revoked and moved to a semi-arid region. The people who benefited were the gold miners, and the pastoralists who could use the water holes for their cattle and sheep. This was a similar situation to that which occurred thirty years later in Gove to the Yolngu, and which instigated the introduction of the whole land rights process.

The book then gives a description of the land under claim, its features, such as the Murchison and Davenport Ranges, the flora, fauna, soil composition and, importantly, the water courses and creeks which crossed the land, as well as the infrastructure present in the area. The book sets out clearly the descent groups and social categories used by the claim group and how this underpins their relationship to land (Keen *et al* 1988). It documents the various Ancestral Beings or "Dreamings" which were of significance to the Warumungu, how *kirda* and *kurtungurlu* were trained and by whom, and the importance of the ceremonies which demonstrated the rich ritual life of the claimants.

Keen *et al* compiled a very detailed section in the book on relations to land. This section showed how the different languages of the groups were closely bound to the areas of land under claim, even though there had been "mix up" over time, and the ways in which the claimants were able to demonstrate affiliations and knowledge of more than one language. As they observed, "each language is in general associated with a tract of country, more or less defined by natural boundaries, even through the boundaries are often fuzzy" (Keen *et al* 1988:43). The genealogies were not included in the claim book but reference was made to

[29] Tungstan ore made up of magnesium and iron.

their compilation, in that they were originally presented in the Warumungu claim, and were "very inclusive ... constructed from information provided almost exclusively by women" (Keen 1990:82). Keen contended that the claimant women approached kinship from a perspective of bilateral kinship connections, while the men concentrated on that of group membership and relations with other groups - a more restrictive perspective. The claim book specifies the name of the group's estates, the language/s identified with the group and its patrimoiety. It also details the Dreamings associated with the land under claim, common spiritual affiliations held by the claimant groups and ties to the land through conception dreaming[30].

As Keen *et al* asserts

> A person is not necessarily a member of the local descent group related to his or her conception site ... in the absence of other bases for group membership, spirit conception is important" (Keen *et al* 1988:103).

The claim book also identifies the ways in which women claim connectedness and relationship to the land and the strength of traditional attachment they hold. Keen notes the involvement of a senior woman claimant in the discussion on who should or should not be included in the claim. This demonstrated that women were actively involved in the land claim process and not just "after thoughts" as seemed to be the case in some of the earlier claims.

In his report Mr. Justice Olney acknowledges that there were differences between the men's ceremonies and those of the women, one of which was the greater number of women who performed as opposed to the men. He comments:

> Women danced in groups representing particular countries and much of the drama of these performances was in the interplay between the groups in relation to the sites they had in common; but this element was absent from the men's ceremonies (Olney 1990:14)

This supported Bell's hypothesis that Aboriginal women of Central Australia "are social actors in their own right ... strong, articulate and knowledgeable women" with "an autonomous ritual life" (Bell 1993:231). At the time of the McLaren

[30] Women were deemed to have been entered by a 'spirit child' who frequented sites of significance. The 'spirit child' then appears to either the mother or father in a dream. It is either the site or the dream which then determines the dreaming of the unborn child.

Creek claim the autonomy of Aboriginal women in ritual and ceremonies was still an issue for debate within Aboriginal communities and anthropology.

Justice Olney then played down the importance of performing ceremonies contending that, while performance and ceremonies were an integral part of the evidence to manifest Aboriginal traditional ownership, they did not constitute the whole body of proof. Thus:

> It does not follow, however, that performing ceremonies for country is a necessary test of traditional ownership but such performances can be construed as one index of the "primary responsibility" which owners have because of the common spiritual affiliations with site on the land ... The reasons for traditional ownership, therefore, while closely bound up with ceremonial considerations, can be found outside of ceremonial life and rather than being culled from what actually occurs in ceremonies, really serve to explain them (Olney 1990:14).

As Rose later observed "Land claims until recently have involved a massive privileging of senior Aboriginal men vis-à-vis senior Aboriginal women". She contended that "The marginalisation and exclusion that Northern Territory women have experienced is in clear contradiction to the intention of the Act" (Rose:1995:2). This difference in power relations between men and women continued throughout the life of the Act. With hindsight, gender relations and the indifference to the significance of women's evidence must have had a detrimental effect upon the evidence given to some of the earlier hearings, because the evidence was incomplete. It was accepted from the beginning of the land claim process that Aboriginal male claimants would need to be able to give evidence in a gender restricted environment because of Aboriginal Law. However, when Aboriginal women requested that their evidence be given in women-only sessions there were strenuous objections from counsel for those opposing the claim (Rose:1995:5).

The McLaren Creek claim book demonstrates that, while not all of the 516 claimants could be considered "traditional owners", most of the claimants could show close traditional affiliations to the land and those found to be traditional owners. It has to be noted that this claim, which was tenaciously opposed by the Attorney-General (NT), was for a pastoral property which was already owned by, and held in trust, for the Aboriginal claimants. In a later claim, Tempe Downs and Middleton Ponds – Luritja, Mr. Justice Gray explains why Aboriginal

claimants used the Land Rights Act to claim land when they already held the freehold in trust. He contended that

> Section 67 prevents the resumption, compulsory acquisition or forfeiture of the land under any law of the Northern Territory. Such a title is more secure than that which is presently available in respect of the land claimed under the laws of the Northern Territory. (Gray 1998:39)

In the McLaren Creek claim the Attorney-General (NT) proposed that the area should be set up as two land trusts in order to accommodate the different claimants. This was rejected by Olney as not a viable proposition because it preempted his findings on the matter and it would have exacerbated the "power struggles" in respect of the boundaries, which he considered to be "totally irrelevant to the overall limits of the traditional land of the respective groups" (Olney 1988:38). More importantly, Olney acknowledges that the area under claim was

> An area of land capable of being commercially exploited as a cattle station and ... it would not be in the best interests of any one or more of the land owning groups to divide the land in a manner which may inhibit the proper management of the land for that purpose. (Olney 1988:38).

In 1988 Mr. Justice Olney recommended that:

> the whole of the land ... be granted to a land trust for the benefit of Aboriginals [sic] entitled by Aboriginal tradition to the use or occupation of that land whether or not the traditional entitlement is qualified as to place, time circumstance, purpose or permission (Olney 1988:4).

During the Hearing, Avery, the anthropologist working for the Commissioner cross examined and challenged the authors of the claim book concerning the inclusion of a claimant who was recognised as a ritual leader of the area, held the rights to important ground-sculptures connected with the Rainbow Serpent, but aligned himself with an Aboriginal group outside the claim area. His inclusion, Avery contended, did not follow the narrow orthodoxy of patrilineal descent, which was the model favoured by the Commissioner in respect of what constituted a "traditional" Aboriginal owner. Keen (1997:86) later concluded that internal Aboriginal political tensions were the basis of this Aboriginal claimant's ambivalence about his identity. Avery's views concerning patrilineal descent seem to have changed over time. His contribution as anthropologist for the Reeves report suggests that he now favours a wider more inclusive definition ascribed to "traditional" Aboriginal owners (Reeves 1998:147).

Tempe Downs, Middleton Ponds/Luritja Land Claim.

In 1973 the claimants began the process of regaining their traditional lands by seeking to purchase the property but all attempts failed and, because of these constant set backs, in 1983 a number of the claimants squatted near a well on the Middleton Ponds station. As the manager of the station prevented them from using other bores they had to bring water from 30 kilometres away, and gates on the property were locked in order to deny Aboriginal people access to the land. The station manager and the Aboriginal people became engaged in a hostile situation with accusations of damage and poisoning leading to the involvement of the police. Any new Aboriginal people were quickly located and "harrassed into departing" (Sackett 1994:27). Persistence and determination on behalf of the claimants to regain their land paid off however, and in 1993, twenty years after the dispute began, the properties were purchased "on behalf of those asserting rights of traditional ownership" (Sackett 1994:27).

The claim for the pastoral leases under the Land Rights Act was lodged in 1993, twenty three years after the commencement of the Act. (It was Land Claim No. 147.) The claim book was compiled at the beginning of 1994, ten years after McLaren Creek, and seventeen years after the Warlpiri and Kartangarurru-Kurintji claim book. Sackett was the anthropologist for the claim and was assisted in the research by a number of people who were employed by the Central Land Council and who produced the genealogies and site maps. The writing of the claim book is quite florid but follows the tried and trusted format of the earlier claims giving a contact history from 1875 and quoting early archaeological dating of Aboriginal occupation "to about 5000BP [before present]" or earlier (Sackett 1994:4).

The claim book considers the ways in which Aboriginal people from this area have thought and talked about themselves and the inscription of designated groups in relation to the land under claim. Sackett highlights the tensions between the different Aboriginal groups but gives no indication as to the Aboriginal mode of resolution for these conflicts. He gives a brief description of the flora, fauna and soil types found in the claim and a more extensive account of contact history.

Sackett identifies how the insensitivity of renowned explorers has remained a source of shame and distress for Aboriginal claimants. Spencer and Gillen, under the guise of scientific research, not only measured and photographed Aboriginal people of the Central Australia, but also photographed "some of the men's most secret ritual performance but most destructive of all...was the collecting of so-called *tjurunga* – sacred wooden and stone objects" (Sackett 1994:21).

These artifacts were an integral part the rich ritual and ceremonial life experienced by the claimant's forebears. The removal of these objects was devastating and mourned by the owners. Sackett recounts violent conflicts which arose between white settlers and Aboriginal people in the area, noting "violence remained a fact of life" (Sackett 1994:23). Aboriginal people not only had to endure the on going physical abuse but were also subjected to invidious abuse through the designation of demeaning nick names, and the imposition of European names, instead of their own Aboriginal names (Sackett 1994:24). Even against this background of oppression and abuse Aboriginal people maintained not only their ritual and ceremonial life, also their traditional beliefs that land or 'country' defined their identity as Aboriginal people.

The claim book then describes the way in which primary and secondary rights are distributed, Luritja kinship terms, and the rights and responsibilities which ownership brings. Sackett then goes on to list the various Dreaming sites associated with the land under claim, identifying those which are secret men-only "Dreamings" and cannot be disclosed in a public document. He does not state whether there are sites that relate specifically to women's business.

The land claim was heard by Mr. Justice Gray and began in November 1994. The women claimants requested that they give their evidence in sessions from which men were excluded, with the exception of the Commissioner. Gray directed:

> That the evidence and the transcript of it not be divulged to anyone other than for the purposes of the land claim and in any event not to be divulged to anyone other than adult females. (Gray 1998:2)

Needless to say the Attorney-General (NT) objected to this, maintaining that as the women claimants were making an exception for the Commissioner "then I

cannot see any difference between ... making one dispensation [and] making two or making three dispensations" (Transcript 1994:210). He then went on to say that the Northern Territory legal team did not have "experienced female counsel – experienced in land claim matters". The only female who was part of the team was a solicitor who had "come along on her first land claim as a learning experience as a solicitor" (Transcript 1994:210).

Commissioner Gray gives the reasons for his decision in a letter in Appendix 5 of his report. It transpired that the Attorney-General had been informed only a few days prior to the hearings that the Aboriginal women claimants were requesting the opportunity to provide restricted evidence - not eight weeks as per the practice directions. Gray thought however that this was enough time for counsel for the Northern Territory to prepare himself to deal with the evidence (Gray 1998). Gray believed that the female counsel was "a competent solicitor, capable of receiving instructions about the interests of the Attorney-General for the Northern Territory and of following them during the giving of evidence" (Gray 1998).

Gray showed considerable sensitivity for the Aboriginal women claimants' need to give gender-restricted evidence and he continued

> I was conscious of the fact that, in giving evidence of secret-sacred matters, Aboriginal people are forced to compromise their position on secrecy and to allow an Aboriginal Land Commissioner and others to hear aspects of sacred knowledge. In many claims, there would be no way of succeeding without making such dispensations... It would be wrong because it is a matter of Aboriginal Law to determine who may hear knowledge, and it is no part of my function to seek to change Aboriginal Law. (Gray 1994:Appendix 5/10)

He then goes on to comment that if he had continued to allow Aboriginal men to give gender specific evidence in a restricted arena then he would be in breach of the Sex Discrimination Act 1984 by treating the Aboriginal women claimants less favourably than the men "in circumstances that are the same or not materially different" (Gray 1994:Appendix 5/11).

At the outset of the hearing the Attorney-General had said that the Northern Territory were not opposing a recommendation that the area of land be granted but rather his instructions were "to assist ... as far as we can in helping [Gray] to

determine who are the traditional owners of the land under claim" (Gray 1998:Appendix 5/4). However the Attorney-General still challenged the hearing of women-only evidence even though the Northern Territory had not challenged the giving of evidence in men-only sessions in previous land claims. The Attorney-General also made a submission that because some of the claimants already benefited from other land claims they should be excluded from this claim as they would not be advantaged by the claim being heard. Gray rejected this argument.

In his report Mr. Justice Gray acknowledged that the total number of 400 Aboriginal people would be advantaged by a successful claim and he identified 95 Aboriginal people who fell within the definition of "traditional Aboriginal owners". He went on to recommend that the land under claim be "granted to a single land trust for the benefit of those Aboriginal people entitled by Aboriginal tradition to use or occupation of that land" (Gray 1998:49). The only area of land not returned by the claim was an area of land that had on it a digital radio concentrator and related buildings. In the report Gray comments that the "summary of the evidence indicates, the strength of traditional attachment of the claimants must be regarded as high. It is manifested by a strong desire to secure the land claimed because of its traditional significance to the claimants" (Gray 1998:38).

Conclusion

The anthropologists employed to construct the claim books were expected to provide the court with a logical, concise document, written primarily as a guide to the evidence to be given by the Aboriginal claimants at the hearing. It places this evidence in context, and explains the basic structures of Aboriginal society and Aboriginal concepts of traditional Law, for the Commissioner and lawyers. Only after the claim books had been lodged with the Commissioner could a date be set for the hearing in to the claim. This was because the claim books were the distillation of the information given by the Aboriginal informants which identified the land under claim, the individual claimants and the premise on which their claim to be the traditional owners of the land under claim was based.

Mr. Justice Toohey commented "A well prepared and documented claim book reduces the time of the hearing and gives those associated with the claim a reasonable understanding of the issues involved" (Toohey 1985:173).

Of the claim books I have considered, there were similarities because the evidence had to be couched to address the Act. There were also some differences which could be the result of the number of contributors to the final book, but all were constructed in a methodical and precise way. The books produced by Peterson *et al* and Keen *et al* were far more detailed than that of Sackett; this may have been due to women presenting their evidence separately. Nevertheless, in each case the claim book presented selected evidence that made the case for the claimants, in that the Aboriginal claimants were identified and their spiritual affiliations and spiritual responsibilities, plus the strength of these, were established in accordance with the Act. Consequently the claim book could be depicted as a text for advocacy, rather than an objective ethnography.

However, this is not strictly correct because the claim books presented the evidence so as to address the Act. The selection process was carried out by the lawyers representing the Aboriginal claimants, in conjunction with the other professionals involved in the collecting of the data, and the claimants themselves. The lawyers then went on to construct their case for the claimants ensuring that they had addressed all the requirements of the Act. This was essential because they had to satisfy the Commissioner, and as I have demonstrated, the Attorney-General (NT) assiduously contested all the land claims, even when he was just assisting the commissioner to establish who were the traditional owners (Gray 1998:Appendix5/4). The anthropologists who compiled the claim books had to be prepared to withstand vigorous cross-examination and testing of their work during the hearings by counsel appearing for those parties who opposed the claim. It was usual for them to give their evidence after the Aboriginal claimants and they were required to explain any discrepancies that may have emerged between the evidence given to the Hearing and that contained in the claim book.

The demands made by the Attorney- General (NT) for more and more proof of connection and 'traditional' ownership to be given by Aboriginal communities

was a time consuming, expensive legal process and demeaning for Aboriginal people who constantly had to explain and justify their religious beliefs. However this rigorous testing resulted in the collection of a huge body of knowledge in respect of Aboriginal social life. It confirmed the complexity of Aboriginal belief systems and reinforced and strengthened the evidence of the connectedness that Aboriginal people have with their "country".

As the authors of the claim books provided a history of the claim area detailing the contact with white settlers, this embedded into the white colonial convict history taught in schools, a black history detailing the discrimination and oppression experienced by Aboriginal people from 1788. The practice of employing female anthropologists to work jointly with male anthropologists on claims resulted in validating the independent role women played in Aboriginal cultural and sacred life, and supported Aboriginal women's requests for the provision of secret sacred evidence to be given in gender restricted settings. Aboriginal women were able, in these restricted arenas, to demonstrate their relationship to land and what it meant to them individually and culturally.

The claim books were in the main practical, detailed and informative, but more importantly, they showed how Aboriginal people think and talk about the land, how land is the basis of Aboriginal Law. The books demonstrate the value Aboriginal people place on the land and that these values go deeper than monetary considerations. For Aboriginal people their "country" is an integral part of their identity. It is what makes them Aboriginal.

Chapter 4.

Sunset and Beyond.

In the previous chapters I have discussed and illustrated the ways in which anthropologists and anthropology have been major contributors to the Land Rights process through the production of knowledge and the interpretation of Aboriginal concepts of rights in land along with the compilation of claim books, I will now reflect on the use of anthropology in recent moves to change the Act. I will make specific reference to the Reeves Review which was commissioned by Senator Herron the Minister for Aboriginal and Torres Strait Islander Affairs, in 1997.

Over time, there have been a number of amendments to the Land Rights Act. Seven years after the implementation of Land Rights Act Mr. Justice Toohey undertook a general review of the provisions and the operation of the Act, and in 1987 the Hawke Labor Government introduced a sunset clause. This amendment stipulated that, after June 4th 1997, no new land claims could be lodged under the Act. Four months after this clause came into effect Senator Herron appointed a Northern Territory Barrister, John Reeves Q.C., to conduct a "comprehensive review of the Aboriginal Land Rights (Northern Territory) Act 1976" (Reeves 1998:I). Professor Richard Blandy, an economist, and Dr. John Avery, an anthropologist, assisted Reeves in conducting this Review.

The review entitled "Building On Land Rights For The Next Generation" was presented to Senator Herron in 1998. The cost of the review was in excess of $1.3 million, and came out of the Aboriginal and Torres Strait Islander Commission's (ATSIC) budget. This review has engendered a considerable amount of debate since it was presented and was so controversial in nature that the Federal Government instructed the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HORSCATSIA) to undertake an Inquiry into the Reeves Review. I will consider the anthropological analysis in the Reeves Report

and how not only anthropologists, but also other professionals, responded to it.

The Reeves Report.

On the first page of the Reeves Review the Report notes that since the Land Rights Act was introduced in 1976, 573,000 square kilometres of land has been returned to Aboriginal owners (Reeves:1998:543). This is approximately 42% of the total land in the Northern Territory. Reeves in his review of the Act claims that:

> There can be no doubt the Land Rights Act has had many positive results for Aboriginal people in the Northern territory. It has returned much of their traditional land to them and helped to enrich their culture and rebuild their confidence as a people (Reeves 1998:1)

After this positive start he then goes on to outline three negative outcomes which he contended had resulted from the Act. Reeves considered that "the monies received under the Act have not been strategically applied to the social and economic advancement of the Aboriginal people of the Northern Territory as a whole" (Reeves 1998:II). He acknowledges that there was a "strident oppositional culture" between the Northern Territory Government and the two large Land Councils as a result of Aboriginal land rights. Reeves then contended that another negative aspect that had resulted from the Act was the requirement to approach the Land councils in order to obtain a permit to enter Aboriginal land. He states that

> These processes and procedures, have for example, increased the costs for the mining and other industries, and restricted access to non-Territorians to almost half the land mass of the Northern territory and about 80% of its coast line. (Reeves 1998:II)

Reeves claimed that his recommendations for reform would address the negative outcomes of the Act while retaining the benefits for Aboriginal people that the Act had accomplished. He summarises these reforms thus

- Aboriginal self-determination in relation to Aboriginal tradition and the primary control of Aboriginal lands will best be achieved by the formation of a system of Regional Land councils that will make all decisions in relation to Aboriginal lands at the regional level.
- A new central body, the Northern Territory Aboriginal Council (NTAC) is proposed. Its main function will be to achieve the socio-economic advancement of Aboriginal people of the Northern territory. It will apply the monies presently received under the Land Rights Act to these purposes, but it can only effectively achieve this outcome if it forms a genuine productive partnership with the Northern Territory and Commonwealth Governments, and individuals and organisations from the broader Northern Territory community.

- Current statutory impediments to a productive partnership between Aboriginal people and other Territorians should be removed. These reforms include removing the need to obtain permits to enter Aboriginal land (and applying instead the Northern territory's trespass laws), and giving the Northern Territory Government a limited power to compulsorily acquire an interest in Aboriginal land for public purposes. (Reeves 1998:III)

Reaction and Critiques.

The Reeves Review and its recommendations engendered significant concern at the Australian Anthropological Society (AAS) conference in 1998 in respect of the quality of the anthropological research carried out for, and presented in, the Review, as well as the way in which the research of some anthropologists had been "selectively quoted, misinterpreted and misunderstood" (Altman, Morphy & Rowse 1999:v). The AAS engaged Peter Sutton to prepare a submission for the Society to the HORCATSIA Inquiry. However, anthropologists were not the only professional discipline to articulate their concerns about Aboriginal communities and the changes to the Land Rights Act. The Land Councils, ATSIC and the Centre for Aboriginal Economic Policy Research (CAEPR) as well as some prominent politicians[31], who had been involved with bringing in the Land Rights Act and policing it at some point during its application expressed their concerns. The former Minister for Aboriginal Affairs Ian Viner Q.C. was quite critical of the intellectual rationale and the objectives of the Reeves Report and considered them, and the model they constructed, to be essentially flawed, seeking to return to the "pre-Woodward days and pre-land rights days" (Viner 1999:190). In effect this would be a return to the days of assimilation and social engineering[32].

Deep misgivings about the objectives expressed in the Review and the motivations of the reviewer were also articulated. This is borne out in the opening statement of ATSIC presented to the HORSCATSIA Inquiry into the recommendations of the Reeves Report held in Canberra in March 1999 which states;

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[31] A letter critical of the Reeves Report appeared in the Canberra Times on 18th July 1999 signed by Malcolm Fraser PM 1975-83, Ian Viner M.of Aboriginal Affairs (MAA) 1975-78, Fred Chaney MAA 1978-80, Peter Baume MAA 1980-82, Ian Wilson MAA 1982-83. All were Liberal party members.
[32] I was at the *Evaluations of the Reeves Report* conference and was stunned to hear Prof. Blandy actually use the phrase "social engineering" in relation to Aboriginal people today.

> In the case of Reeves the problems are so significant that they have to be addressed. These problems start with the unsuitability of the reviewer. A single Northern Territory barrister, who had limited experience in the area of land rights, and with a strong political involvement in the life of the Northern Territory, was clearly an inappropriate choice. There is a perception, rightly or wrongly, of this bias and of an agenda set by the Northern Territory Government.

As I have shown in the previous chapters, Aboriginal claimants have had little cause to trust the Northern Territory Government and their supporters. Reeves highlights the "strident oppositional political culture [that] has developed in the Northern Territory with respect to Aboriginal land rights" (Reeves:1998:II). ATSIC were less than subtle in their opening remarks of the submission made to the HORSCATSIA Inquiry concerning of Reeves' impartiality and his association with the Northern Territory Government.

Garth Nettheim also claims that the Country Liberal Party have used their opposition to Aboriginal land rights and self-determination as a vote catcher, and

> the Land Rights Act has become inextricably embedded in the politics of the Northern Territory. There is a long legacy of profound distrust of the Territory Government by Aboriginal Territorians. There is an even longer legacy of hostility by that government towards Aboriginal peoples' organisations and, in particular, towards the CLC and the NLC (Nettheim:1999:91).

Because of the concerns raised across the professions by the Reeves Review a conference was convened in Canberra in March 1999 titled "Evaluating the Reeves report: Cross Disciplinary Perspectives", sponsored by the Department of Archeology and Anthropology, CAEPR and The Australian National University. The CAEPR monograph no.14 *Land Rights at Risk: Evaluations of the Reeves Report* contains the papers given at this conference and was published within three months of the event. The aim of the Conference was to enable wide-ranging debate and independent evaluation of the Report from a "diversity of disciplinary perspectives, not just anthropology", and, because of the complexities of both the Land Rights Act and the Reeves Report it would help "all participants to disassemble and more fully understand the interrelationships between the reports numerous, and at times quite unexpected and controversial, recommendations for change" (Altman *et al* 1999:vi).

The Anthropology in the Report.

Dr. John Avery, as anthropologist working with Reeves, the putative author of the Report, has methodically reviewed the literature in respect of Aboriginal local organisation, going back to the very early work of, among others, Radcliffe-Brown, Olive Pink, Stanner, Meggitt and Hiatt, moving on to the more recent work of Merlan and Sutton. However he has picked out aspects which indicate the existence and importance of local networks and supra-local ties, promoting the case for the regional or wider "community" concept as opposed to the "local" or clan model embedded in the Act, or has chosen to represent those views which support an absence of exclusivity in land and its boundaries (Sutton), or the multiplicity of bases in land (Merlan). Avery stresses the importance of the relationship with the father, and acknowledges the *kurtungurlu* or manager relationship, which have been dealt with comprehensively under the Act, (Peterson *et al* 1978,Keen *et al* 1988). The author then lists other significant relationships which Aboriginal people may have to the land, going on to say that the way land is used and occupied does not reflect these spiritual relationships, but that there are "localised relationships to land mediated through sacred sites" (Reeves 1998:146). Avery postulates that the spiritual connections did not form the basis of Aboriginal communities, but that these arose around the location of resources, such as water, game and other food sources. He claims that regional populations tend to be linguistically cohesive. Having acknowledged that Aboriginal people do have primary responsibilities and relationships to localised areas which contain sacred sites, he then asserts that these ties of particular individuals and groups to land ... are component parts of a regional culture maintained by the regional population (Reeves 1998:147).

Avery does not take account of the fact that these regional grouping or networks, while they may be present, are not discrete, bounded groups but overlap. He does not identify those who have primary proprietorial rights, and indeed appears to agree with Blackburn in the Gove Case judgement that a clan's relation to its land is not proprietorial. This judgment was superseded by the Mabo decision handed down by

the High Court in June 1992. The land claim process has tested a considerable amount of evidence and shown that rights in land are in fact vested in the smaller more discrete levels of Aboriginal society.

Avery has couched the anthropological views in the Reeves Report in such a way as to support the recasting of the Act as a vehicle for administering land rather than for making land claims, which was the main function of the original definition of traditional Aboriginal owners.

The anthropology contained in the Report has been systematically reviewed by Peterson, Williams, Morphy, Sutton and others. Sir Edward Woodward (1999:7) noted the manner in which Reeves had been selective in his use of anthropology. Morphy in his submission prepared on behalf of the Northern Land Council for the HORCATSIA Inquiry, and in a paper given at the above conference, argued that the anthropological evidence can be criticised on two counts in that it does not follow the current thinking on Aboriginal land ownership, and the recommendations in the report do not logically follow from the anthropological analysis.

Morphy asserts that the conclusions of the Report do not reflect the extensive body of work that is now available, and that

> (Reeves) view of Aboriginal Land ownership and local group organisation is heavily constructed towards the conclusions that he draws, and he misrepresents and simplifies the current state of knowledge. (Morphy 1999a:2)

Morphy (1999*a*:4) went on to state that Reeves' inference that "patrilocal-patrilineal corporate groups" formed the basis of the definition of traditional owner was erroneous because in the Act the definition does not mention either partrilineality or residence. He then goes on to assert that it is the spiritual aspects which are fundamental to Aboriginal land ownership saying "Aboriginal systems of land ownership do not focus on exclusive *use* of land. Rather they centre on ownership *of the land itself and the sacred property associated with the land*" (Morphy 1999*a*:11). He concludes that redefining the Act in order for it to become a "vehicle for

development" is just another way of invalidating the Act, and in so doing reducing "the autonomy of Aboriginal people ... compromises [their] independence and will have the opposite effect of that (ostensibly) intended" (Morphy 1999a:34).

Reeves states that Aboriginal self-determination has been undermined because of the statutory definition of "traditional" Aboriginal owner which locates power and control of land, and therefore the economic benefits, in the hands of a privileged few.

In his report Reeves concludes

> that the focus on traditional Aboriginal owners within the scheme of the Land Rights Act did not and does not, adequately reflect either the state of anthropological understanding, or the reality, of Aboriginal traditional practices and processes in relation to the control of land. It is deficient because it pays too little regard to the dynamics of Aboriginal tradition within in the wider regional populations to which these smaller localised groups belong. (Reeves:1998:119)

This confirmed Reeves favouring the collapsing of the distinct groups of "traditional owner" or "clan" and the wider band of "resident" into one group. This is a particular reading of Aboriginal concepts of relationships to land, and has been a source of conflict within Aboriginal communities and sometimes fiercely resisted (Keen *et al*:1988). It was also a position which Avery, when anthropologist for the Commissioner on the Mc Laren Creek Land Claim, had strongly contested, as he had in the Borroloola Land Claim book which he prepared. Peterson (1999:30) argued that "it is not the statutory definition of traditional owner that has posed problems for economic development ... but a complex of factors, including location, that get no substantive discussion at all [in the Report]".

Sir Edward Woodward in his submission to the Senate Inquiry asserts that Reeves' belief that he (Woodward) was unaware of the nuances of Aboriginal relationships was incorrect and he explained his rationale in regard to the definition of 'traditional owner thus

> I took the view that it was impossible to legislate to protect all those different rights and entitlements given by Aboriginal Law, and that the best course to take was *to recognise the authority of the elders of the clan which was the primary owner of the land, and to rely on them in turn to recognise and respect the lesser rights of others in that land.* I am not persuaded by anything in the Reeves Report that this was the wrong approach at that time. (emphasis added. Woodward 1998:3)

It was evident in the Woodward Report that the intentions of the Act were to enable Aboriginal people to achieve autonomy in decision making in respect of their land and find their own solutions to the difficulties and problems which had arisen due to the impact of settlement. Sir Edward goes on to comment that Reeves' conclusions that he, Woodward, had overlooked the wider group, "the regional community", because of "the preference, within anthropology, for simple explanatory concepts, rather than complex, dynamic, and multi-faceted processes" (Reeves 1998:140), were fallacious, noting that "I have never detected any trace of it in any of the anthropologists with whom I worked" (Woodward 1999:7).

In fact since 1975, Peterson, who was the anthropologist to the Woodward Commission, has written extensively on the complexity of Aboriginal structure, its divisions and the ways in which these relate to land. The claim books presented in evidence for claims under the Act also demonstrate these complexities (Peterson 1978, Keen 1988). Sir Edward while acknowledging that there have been conflicts as a result of the Act, believed that at the time the emphasis placed on the "clan" was, and still is, the appropriate one. Sir Edward goes on to comment that it would have been more appropriate for Reeves to have considered the work of Stanner and Berndt, rather than using the work of Radcliffe-Brown, as representative of "the traditional anthropological view", as the work of Stanner and Berndt would have provided "a more difficult target for his criticisms" (Woodward 1999:3).

As I have shown the general consensus of opinion concerning the Reeves Report was that it was flawed. It misused current anthropological thinking and the anthropological analysis seemed to have been presented in such a way as to fit the recommendations. The anthropological analysis in the Reeves Review reinterpreted the local descent group changing its context to conform to the desired outcome of the Inquiry set out in Reeves' recommendations. On the whole the general consensus is that the anthropological advice Reeves was given was substantially incorrect, or the sources used misinterpreted.

The Permit System

Reeves in his Report seemed determined to negate the effectiveness of the Land Rights Act in respect of the power, authority and control Aboriginal People exercised over the land which had been returned to them by the Act. As noted earlier, he recommended that the permit system which operates for entry to Aboriginal land be removed and that if Aboriginal land owners wanted to maintain the integrity of their land to prevent access from outsiders they should use the Australian Laws of Trespass. He argued that access to Aboriginal land was based on the social relationships of the group who owns the land with those who want to use or enter the area. Reeves maintained that the anthropological advice he had been given showed that

> strangers or visitors were not required to obtain permission before entering the land ... Aboriginal custom did not appear to include a commonly acknowledged right to exclude others from lands, except sacred sites. (Reeves1998:305)

Howard Morphy (1999*b*:46) asserts that Aboriginal people did exclude others from their land, especially when there had been a death and when ceremonies were being performed, they actively discouraged other groups who made incursions into their land to remove economic resources such as ochre. The Peterson *et al*, Keen *et al* and Sackett claim books submitted in evidence for claims under the Land Rights Act also provide accounts of Aboriginal people not being prepared to move over other clans' lands.

While Aboriginal people were aware of the restrictions on their movements over other clans' lands, non-indigenous Australians have found this difficult to comprehend because of the lack of tangible boundaries. Nancy Williams acknowledged that there was dissatisfaction in some quarters

> with the manner in which the procedures of Aboriginal law and the permit system have been articulated. Some 'problems' with the permit system to some extent reflect genuine issues or difficulties; others are spurious. (Williams 1999:53)

Williams articulates the underlying motif of the Reeves Report in relation to accessing Aboriginal land as one of resentment on the part of non-Aboriginal people

giving, as an example, the graffiti which is visible on signs which denote the presence of sacred sites and Aboriginal boundaries. She notes, that graffiti "such as 'apartheid' and 'passport' substituted for 'permit', and other racially pejorative terms" (Williams 1999:63). Williams then reflects on the way non-Aboriginal Australians seem to consider Aboriginal land as land any one can use, belonging to no-one, and not private land like their own freehold land. She concludes that "an unpalatable alternative is that the inability, or refusal, to regard Aboriginal land as subject to the same conditions of access as other freehold land is a function of racism" (Williams 1999:64). The NLC submission tells of Aboriginal people informing Reeves at the public hearing that they, in fact, favoured a stronger permit system (NLC 1999:6).

Costs and Benefits

Reeves and his advisors addressed the costs and benefits which Aboriginal people derive from land. At the conference in March 1999, Professor Blandy, Reeves' economic advisor, was quite explicit in his views on the value of land which was under claim in the Northern Territory. He said "the land was of no value" and the tone of his presentation was that Aborigines should start to move on from rights in land to catch up with the rest of society in these economic rationalist times. Many present felt that he held scant regard or respect for the sensitivities of the Aboriginal people at the conference for whom land has been shown to hold far more than mere economic value. It was as if the evidence amassed through the land claims process, which verified how deeply land is embedded in Aboriginal identity was of no significance.

Ian Viner (1999:191) asserts that The Act was never introduced as a way of ensuring economic development on Aboriginal land but was

> enacted to bring simple justice to the Aboriginal people ... to recognise, by the grant of land rights titles to traditional land ... the unique and distinct system of customary law of Aboriginal people by a bill which dealt with the recognition of land rights.

He expressed concern at the ambit of changes put forward in the Reeves Report

which put Aboriginal land rights in jeopardy. He was also concerned that Aboriginal people might lose the rights they already held. Viner held that the Reeves Report overtly supported the reintroduction of "social engineering". Viner thought that this was confirmed by Avery's comment at the conference, He quoted Avery thus "there is no plan to maximise the benefits to Aboriginal people from land rights, no policy, so we have to reorient the machine" (Viner:1999:192). Viner's reading of this comment led him to conclude that Avery considered it necessary to "engage in some social engineering, some reengineering of the 'machine' that was created by the Land Rights Act" (Viner 1999:192).

The Structure of Land Councils.

In the submission to HORSCATSIA the Northern Land Council expressed the view that the Land Rights Act was able to recognise Aboriginal modes of decision making and Aboriginal Law. The Act because of its flexibility was seen to provide an interface between two disparate legal processes, namely Aboriginal law and Australian law (NLC 1999:4). However, they then asserted that "the radical reform of the Land Rights Act proposed by the Reeves Report is based on faulty legal and anthropological theory" and that, as Reeves arguments for dismantling the Land Councils had been based on this flawed and misinterpreted data, his analysis would also be distorted. They, naturally, had grave concerns in respect of the overarching body – the Northern Territory Aboriginal Council (NTAC), he had recommended.

The NLC maintained that Aboriginal people saw this as a "centralised, politically–appointed body" which would be used to control the eighteen Regional Land Councils through having the overall control of the monies devolved from the Aboriginal Benefits Reserve (ABR). NTAC would be just another "arm of Government and would have significant control over activity on previously privately-owned Aboriginal Land" (NLC 1999:5). The end result would be that the Government would use the monies of the ABR, which are compensatory monies for government services that they should be providing of right. NTAC would also take

away the autonomy of Aboriginal people and force them back into the days of assimilation, which seems to have been at the root of this Report albeit under the economic rationalist language of 'social engineering'.

It was evident that the new structures would not provide for traditional Aboriginal modes of decision making and would effectively hinder Aboriginal self-determination (which was central to the Woodward Commission's findings) and they would, to all intents and purposes, have no 'voice' in relation to how Aboriginal land is used. The power would be devolved back to the Northern Territory and Commonwealth Governments. The NLC asserted that the Reeves model of land rights would effect the

> disempowerment of traditional owners, and the transfer of their traditional authority to politically-controlled Regional Land Councils: Considerably increasing the powers of the Northern Territory Government over Aboriginal land, including compulsory acquisition. (NLC 1999:8)

Levitus (1999:129) agrees with this assertion commenting

> Reeves invokes a different conception of land rights in which it serves less as a base for self-determination of local peoples and more as an instrument of formal social equalising and economic merging.

The whole report on the one hand seems to verify the beneficial results of the Act for Aboriginal people, which are then methodically dissected and denigrated. Reeves comments that

> If Aboriginal self-determination has any meaning at all, it must apply first and foremost to the processes and practices of Aboriginal tradition and the effective control, by Aboriginal people, of their lands (Reeves:1998:1).

The Rejection of the Report.

In August 1999 HORSCATSIA's findings, in relation to the Reeves Report, were released. The report entitled *Unlocking the Future* was clear as to the Committee's commitment to preserving Aboriginal rights in land advocating the continuance of Aboriginal self- determination and any amendments to the Land Rights Act "should

be enabling rather than prescriptive – facilitating processes rather than determining outcomes" (HORSCATSIA 1999:7). This would go some way to provide Aboriginal people with the power to control their own destiny. The Committee acknowledged that NTAC was clearly "rejected by Aboriginal people (1999:48). The Committee went on to reject Reeves' recommendation to establish the NTAC as an authority under the Land Rights Act 1976. The Committee also rejected Reeves proposal with regard to replacing the permit system with a Trespass Act (HORSCATSIA 1999:121). The Committee, in the final chapter, comment that Reeves Report had caused some controversy not only in the Northern Territory but also throughout Australia. However, they also note that this should be seen as a useful exercise because by providing a different perspective and highlighting some contentious aspects of the Act, it had "given people the opportunity to reconsider and reaffirm their support for the existing arrangements"(HORSCATSIA 1999:155). On the other hand, it was a very expensive exercise both financially and emotionally for Aboriginal people.

Chapter 5.

Conclusion: Claiming the Future.

In conclusion, I will draw together what I believe are those elements which demonstrate the influence that anthropology has had on land rights, examining why anthropologists were prepared to leave the ordered realms of academia to enter what became an area of severe contestation. This is an arena in which anthropologists have had to be ever vigilant in respect of the use and abuse of their research data, anthropological models and concepts, and had to defend and explain these through the legal process of the Land Rights Act. They have had to contend with an adversarial process which scrutinised, not only anthropology, but also the anthropologist's credentials as well.

I would argue that anthropology, and anthropologists who have been involved in the land rights process occupy a site, firmly located between Aboriginal claimants on the one hand, and the Federal and State Institutions, along with miners, pastoralists, industries and the wider Australian population on the other. This site, which I have termed the 'zone of interaction', is where, initially, anthropologists chose to go. It is a place in which they have engaged with Aboriginal groups and have been party to the exchange of information and knowledge. Aboriginal people allowed them to live within, and learn about the minutia of Aboriginal daily life, teaching them, where appropriate, about the ceremonies, rituals and belief systems which operate within the Aboriginal realm, and locating them within the Aboriginal system by giving them skin names.

Anthropologists have in return, participated in the daily life and life-style of Aboriginal communities, listened, asked questions, made notes and transferred an oral culture into text by way of ethnographies. They have analysed the events and the details of their research and reached, in general, an understanding of the group dynamics, including what makes Aboriginal people continue to hold the views they do, and why. They became part of the Aboriginal network. This zone was the site of fieldwork. This was a site they would write about and authenticate in ethnography.

In this area anthropologists not only extended their personal knowledge, but also added to and informed the discipline of anthropology by the substantiating of models and theories of Aboriginal societies.

They have challenged and countered previously held concepts of Aboriginal organisation in journals and articles and these have then been laid open to peer review. By establishing these concepts in the contested arena of land rights, anthropologists have brought them from the specialist field of academia and embodied these ideas into the popular thinking and language of the wider Australian society. However it was this zone of interaction which has raised doubts in the minds and writing of those who contest the objectivity of anthropologists who work for the Land Councils or Aboriginal representative bodies. They question whether these anthropologists are advocates or objective researchers. This dichotomy has been there since the implementation of the Act and has become more strident since the Native Title Act 1993 was brought in and then amended in 1998.

From the inception of the Land Rights Act, the legal process, the hearings associated with it, and the compilation of claim books as evidence for the Aboriginal claimants, has ensured that this zone of interaction has become an area of contestation. Land rights was always going to be political in nature, because to address Aboriginal issues required the wider Australian society to acknowledge the discrimination which had been experienced by Aboriginal people since the arrival of the settlers. Whitlam expressed this view during the 1972 election campaign. At the instigation of the Whitlam Government the Woodward Commission was set up with the intention of returning land back to its traditional owners.

In his legal practice, Woodward had worked with the anthropologists, Professors Stanner and Berndt, and recognised that their fieldwork practice placed them in a privileged position, and he sought to employ those skills in order to accomplish his objectives. He appointed a young but experienced anthropologist (Peterson) as research assistant to record and interpret Aboriginal social organisation for the Commission. I have demonstrated that Woodward had a social conscience and

intended to make a difference. The introduction of the Land Rights Act went some way to achieving "the reasonable aspirations" of Aboriginal people in the Northern Territory.

From the beginning of the Act anthropologists have had to undertake a steep learning curve, starting from an academic professional discipline and trying to situate the theories and models of anthropology, gained from fieldwork in Aboriginal communities, into a new and unique piece of legislation. Neate (1989:239) notes the opinions of two of the Commissioners (Toohey and Maurice) who have commented that anthropological principles lay "very much at the heart" of the process and that "despite the problems that lawyers might have in coming to terms with the language and ideas of anthropologists, these inquiries are very much exercises in anthropology". Anthropologists did not work in a vacuum, they had to carry out these 'exercises' within a complex legislative system, and be prepared to have their findings and analyses systematically cross examined, while maintaining an appropriate working relationship with Aboriginal claimants.

As I have indicated, this anthropological practice was not confined to the rarefied world of academia but was applied in an area that was highly contested and political. This was due in some part to the adversarial legal system that pitted Aboriginal people against the Northern Territory Government. I have illustrated in chapters three and four how the Northern Territory Government was vehemently opposed to land being returned to Aboriginal communities, with this opposition strongly resonating in some sections of wider Territorian society as well as in other States of Australia.

This oppositional culture was evident in the way that the Attorney-General of the Northern Territory assiduously challenged every claim regardless of its merit. As Toohey observed in his review of the Act completed in 1983

> For the new body politic [the Northern Territory Government] the Land Rights Act has wide implications and its interests are not always commensurate with those of Aboriginal claimants and Land Councils nor with those of the Commonwealth Government (Toohey:1983:2).

However in a land claim judgement made in 1980, quoted by Bell (1986:203),

Mr. Justice Toohey took a slightly different stance on the contribution made by anthropologists, firmly placing anthropology as an significant component of the Act, but not the most important element. He states

> The Land Rights Act is not an exercise in anthropology. Anthropologists are the recorders of material and their capacity to collate it, and its presentation to a hearing and comment upon it has proved invaluable ... But in the end, what has to be done is to determine the meaning of the words used in the Act, construe the definition accordingly and then apply it to the material presented.

During the Act anthropologists have had to work closely with the legal profession which expected them to perform as expert witnesses for the benefit of the Court, and mediate between the Court and the Aboriginal claimants during the preparation of the case. The lawyers were also on a "steep learning curve" about Aboriginal society and culture and had to learn about the complexities of Aboriginal traditional Law. What was not readily understood by either the lawyers or the legislators were the differences found in the value system of Anglo-Australian society, which are inherent in the Australian legal system, and those values which under-pinned Aboriginal society. These differences had to be demonstrated for the Court but, initially, the uniqueness of the Act meant that there were no precedents for the legal system to fall back on when problems arose (Bell:1986:203).

This situation has changed somewhat, because up to 30 June 1998 there have been 249 claims, of which 62 have been heard and reports handed down (ALC:1998). But each claim when it came to court was looked at afresh, nothing was taken as read, no assumptions made as to the veracity of the claim. The Aboriginal claimants still had to prove on each occasion that they were the "traditional" owners to the land under claim in accordance with the Act, at great cost both economically and emotionally.

As the claims have been processed both the lawyers and anthropologists have become more confident and adept at dealing with them. Some Commissioners have increased the role of the anthropologist, while others have drawn very clear boundaries around what they expected from both the lawyers and the consulting anthropologists. Maddock illustrated the extent of these differing roles thus

> Lawyers who prepare a case not only formulate a legal argument and draw up documents

> (such as a statement of claim) but also see the evidence for their client ... forming an opinion on the impression they [witnesses] are likely to make on testifying ... a barrister is briefed to appear in court. Evidence, in other words, should be "sewn up" by lawyers before the hearing starts. *It is not for the expert witnesses [anthropologists] to take up the needle and thread* (my emphasis) (Maddock:1989:163).

While primarily anthropologists were in partnership with the claimants and their lawyers they also had to serve the overarching legal process. This was an issue which those involved in compiling claim books were conversant with, and accepted as part of the consultancy process. Anthropologists also had to be cognisant of their professional Code of Ethics and the possible use made by others of material and /or information gained from informants. The AAS's Code of Ethics is quite explicit in

> Section 3.8. Members should not knowingly or avoidably allow information gained on a basis of trust and cooperation of those studied to be used against their legitimate interests by hostile third parties.

The Code (Section 3.1) also requires the anthropologist to put the views of those studied first "except where this would compromise a member's conscience of commitment to truthfulness".

Throughout the life of the Act, anthropologists have found themselves not only located in the centre of conflict between Aborigines and the Institutional powers, but also in a realm of disputation between those contesting the claims and fellow anthropologists whose analysis differs from that of the consulting anthropologist. Anthropologists, by their involvement in both the collection and compilation of Aboriginal evidence, have laid themselves open to the ongoing questioning of bias in favour of the Aboriginal claimants. It is an issue that has become even more acrimonious during recent time as a result of a number of high profile cases[33], not necessarily under the Land Rights Act, in which anthropologists and their testimony has been heavily criticised.

I contend that this does pose difficulties for anthropologists when working for opposing interests in the land claim situation and trying not to breach the AAS Code of Ethics. However the way around these difficulties is to have extensive peer review of the data and an anthropologist, working with the Commissioner,

[33] The 1994 Hindmarsh Bridge Inquiry and the Yorta Yorta Native Title Claim in 1999.

who has in-depth knowledge of the people and the area under claim. This goes some way to ensure the objectivity of the process and of the personnel involved. It is difficult to eliminate some personal bias when working with dissenting groups in such a contentious area as land claims because so much is at stake for all concerned.

Against the overt hostility of the Northern Territory Government, it is hardly surprising that Aboriginal people were, where possible, only prepared to engage with them through a third party, the Land Councils or an anthropologist, who, not only was aware of the tensions which existed, but was conversant with their history of dispossession, diaspora, assimilation, and power differentials. The anthropologist was initially seen by the legal profession to be ideally placed, to act as mediator and interpreter for the Aboriginal claimants during the legal process, even if the anthropologist may not necessarily have agreed, the Act seemed to require it. The anthropologist also had the added advantage of coming from a similar background to the claimant's adversaries and knowing how bureaucracies work.

Anthropology and its practitioners have had to be circumspect in the face of dissenting voices both inside and outside the profession. This was demonstrated by the Reeves Report that was the cause of some misgivings and concern, not only within the AAS, but also across a wide range of professions and disciplines. I have outlined in Chapter Four the ways in which anthropological data was systematically misinterpreted and taken out of context for dubious reasons.

I believe that anthropologists have supported Aboriginal people to claim the future for themselves through the land rights process, and that anthropology fulfilled its task of recording, explaining and interpreting Aboriginal society and culture so well, that it resulted in subsequent Native Title legislation being framed in a more structured way than the unique piece of legislation, which was the Aboriginal Land Rights Act 1976.

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